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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF APPEALS

—OF—

WEST VIRGINIA

At the Spring-Special Term, the June Term, the September Term and the Fall-Special Term of 1885,

—BY—

ALFRED CALDWELL,

ATTORNEY-GENERAL AND EX OFFICIO REPORTER.

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REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF APPEALS

OF WEST VIRGINIA.

ERRATUM.

Page 160 line 26 for *creditor* read *debtor*.

1. In no suit brought against infants to sell their real estate can a decree be entered by a court, unless a *guardian ad litem* has been appointed for them, and he has filed for them an answer. (p. 23.;

2. If a decree be in such a suit entered by the court, ordering a sale of the lands of infants, before a *guardian ad litem* is appointed for them, and before he files an answer for them, and under such decree the lands of infants be sold, and the sale be confirmed by the court, any one of these infants may within six months, after he attains the age of twenty-one, appear in the suit, whether it be ended or not, and have these decrees reviewed and reversed, and on such a reversal of such decrees for this error the title of the purchaser of the land falls, and the parties must by proper proceedings by the court be put *in statu quo*. (p. 28)

3. A widow entitled to dower in the real estate of her deceased husband is neither a joint-tenant, tenant in common nor copar-

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654 613

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*Counsel below.

†The other decisions announced at this term are reported in Vol. XXV.

cener with the heirs at law within the meaning of the statute concerning partition (Code, ch. 79), so as to authorize a court of equity to sell the legal estate of the heirs descended to them, and to have her dower assigned to her out of the proceeds, and the residue divided among the heirs and those having vendor's liens on the lands, if any one heir refuses to give his assent thereto, or if any one heir be an infant defendant, the widow being the plaintiff in the suit. (p. 19.)

4. A widow can not bring a suit in chancery to have all the lands of her husband sold, and out of the proceeds of such sale to have the value of her dower paid, and the residue paid to the creditors of her husband, and if any surplus remains, to have it divided among her children the sole heirs of her husband. Such general creditors' bill she can not bring; and no suit, which she brings, can by petition or in any other manner be converted into a creditors' bill. (p. 23.)

GREEN, JUDGE, furnishes the following statement of the case:

In 1868 Elizabeth M. Hull, widow of Felix H. Hull, and Hugh W. Sheffey, administrator of Felix H. Hull, filed their bill in the circuit court of Pocahontas county, West Virginia, setting out that Felix H. Hull died intestate in Highland county, Virginia, in the fall of 1861, leaving as surviving heirs a widow Elizabeth M. Hull and three infant children Edger P, Hull, Felix H. Hull and Lillie Hull. Letters of administration were granted by the county court of Highland county Virginia, to Hugh W. Sheffey. He proceeded to administer the personal estate and found the same insufficient to pay the intestate's debts. He then, the bill states, instituted a suit in the circuit court of Highland county Virginia to compel the creditors to prove their debts, and after exhausting the personal assets to obtain a decree for the sale of the intestate's lands after assignment of dower to the widow. But the State of West Virginia having been formed out of the State of Virginia, the circuit court of Highland county, which remained in Virginia, could not decree the sale of the intestate's land, lying in Pocahontas county, which was within the bounds of West Virginia, and thus a necessity arose for the institution of this suit to obtain a decree from the circuit court of Pocahontas county in aid of the administration of the estate of the intestate in Highland county, Virginia. Thereupon on September 26, 1867, in said suit the circuit

court of Highland county made a decree upon the petition of Hugh W. Sheffey, the administrator of Felix W. Hull, with the concurrence and approval of the widow, Elizabeth M. Hull, certifying to N. Harrison the judge of the circuit court of Pocahontas county the following facts:

"That the estate of Felix H. Hull is in due course of administration in this court; that the reports of a master commissioner showing the amount of the personal assets in the hands of the administrator to be administered, and the amount of the indebtedness of the estate are before this court, and that the indebtedness of the said estate is very largely in excess of the personal assets, and that the sale of certain lands belonging to the estate of said Felix H. Hull, and situate in the county of Pocahontas in West Virginia will be necessary in aid of the assets within the jurisdiction of this court to discharge the debts of the estate of said Felix H. Hull, deceased; that this Court respectfully requests the circuit court of Pocahontas county in the State of West Virginia, to decree a sale of the lands belonging to the estate of said Felix H. Hull, deceased, lying in said county for the purpose aforesaid, and that the Hon. Hugh W. Sheffey and James Bumgardner, Jr., Esq. are authorized to act in that behalf as commissioners of this Court."

The bill then states that all the lands in Pocahontas county referred to in this decree, as seized by Felix H. Hull at the time of his death, were as follows: First: Four tracts of land containing in all 3,280 acres of land, which on October 13, 1853, Andrew G. Mathews agreed to convey to Felix H. Hull, now deceased, for $2,000.00 in cash and $8,000,00 to be paid in four annual payments of $2,000.00 each, to be paid on October 1 in each successive year for four years, on the payment of which a general warranty deed was to be made of three of these tracts of land, and a special warranty deed for the fourth containing 260 acres. A copy of this agreement was filed with the bill. This agreement was not recorded. Second: A tract of land of 1,180 acres conveyed by Ann M. Mathews and Mary Ann Mathews to Felix H. Hull in his lifetime on January 1, 1855, by deed recorded. The grantors were the widow and only child of Samuel L. Mathews, who died intestate, and who by a contract made July 4, 1854, had agreed to

convey this land to Felix H. Hull, now deceased. This deed was a general warranty deed and the consideration was $5,313.00. A vendor's lien was reserved on the face of this deed to secure the unpaid purchase-money, all of which, the bill says, was paid except $——, the bill failing to state the amount unpaid. This deed was recorded, and a copy of it was filed with the bill. Third: The lands conveyed by Joseph McClung and Mary J. McClung to Felix H. McClung in his lifetime by deed, dated September 20, 1855. The land so conveyed is thus described in the deed, a copy of which is filed with the bill: "The entire interest of the grantors in the lands formerly owned by Jacob W. Mathews known as the home tract, which embraces several tracts, together with their interest in the lands formerly belonging to said Mathews in said county, excepting several small tracts previously sold to John W. Warrick." The consideration was $833.33⅓ to be paid in cash October 1, 1855, four days after the making of this deed, and $2,500.00 to be paid at a future day, time not named in the deed, and bearing interest from October 1, 1855, and the balance of the purchase-money, $1,666.66⅔, to be paid on October 1 next succeeding the death of the widow of Jacob W. Mathews. This deed was a general warranty deed and retained a vendor's lien for the unpaid purchase-money. The whole purchase-money was $5,000.00. The bill states that there was conveyed by this deed an interest in thirteen different parcels of land, mentioning their size and the interest in each conveyed, which varied from one half to one fourth of these different tracts of land. The bill alleges, that all of the purchase-money for their interest in these different tracts of land has been paid except $1,000.00 with interest from September, 1858, which is coming to Kyle Bright, the personal representative of Joseph McClung, deceased. Fourth. A parcel of land of 200 acres conveyed to Felix H. Hull by Uriah Horner and wife by deed dated May 22, 1856. This deed was recorded, and a copy of it was filed with the bill. It was a general warranty deed and all the purchase-money had been paid when the deed was made. Elizabeth M. Hull, one of the plaintiffs and the widow of Felix H. Hull, the bill alleges, owned an undivided moiety of these thirteen tracts of land, an interest in which was conveyed by Joseph

McClung and wife to her husband; and she states in the bill, that she is willing her moiety of these lands should be sold with the rest of the lands of Felix H. Hull, deceased, the court securing her interest therein. She owned the moiety of these lands as the heir of Jacob W. Mathews deceased.

There was also filed with the bill a copy of another decree in said suit brought by Hugh W. Sheffey, one of the plaintiffs in this suit, as administrator of Felix H. Hull in the circuit court of Highland county Virginia. The portions of the decree, which have any bearing on this case, are as follows:

"And it appearing from the statements in the petition of Hugh W. Sheffey, administrator, that lands of very considerable value belonging to the estate of said Felix H. Hull, deceased, and situated in the county of Pocahontas, in the State of West Virginia, and subject to liens, one for about $2,000.00 held by James H. Renick, of Greenbrier, West Virginia, and another of about $1,000.00 (the exact amount not known) in the hands of William H. McClintic, of Pocahontas county, West Virginia, and that the holders of said liens threaten to attach said lands or set them up to sale to enforce their liens, and that said lands are in danger of being sacrificed by such action, and that the said owners of said liens propose, upon receiving one half of the amount of their said liens, to suspend all proceedings against said lands and to await the convenience of the estate for the payment of the remainder, in consideration whereof, it is adjudged, ordered and decreed that Hugh W. Sheffey, administrator of Felix H. Hull, deceased, be and he is hereby authorized to collect of Robert J. Glendy, of the proceeds of the sale of the Branch farm heretofore ratified and confirmed by this court, an amount equal to one half of said liens owned by said Renick and McClintic, and apply said amount to the payment of said liens on the conditions mentioned in said petition; and the court being satisfied that the sale of a portion of the real estate of said Felix H. Hull will be necessary in aid of the personal assets to discharge the debts of the estate, it is ordered and decreed that Hugh W. Sheffey and James Bumgardner, Jr., be and they are hereby authorized to act as commissioners of this court for the purpose of affecting a sale of said lands in Poca-

hontas county, West Virginia, and they are directed to take such steps as are necessary to obtain a decree from the circuit court of Pocahontas county, West Virginia; and in order to facilitate the sale of said lands, it is further adjudged, ordered and decreed that Eelizabeth M. Hull, widow of Felix H. Hull, deceased, if she is advised to do so, may relinquish her dower in the said lands lying in Pocahontas county, West Virginia, in case they be sold, and receive compensation therefor in the lands of the estate lying in Highland county, Virginia."

This is all that appears in the record in reference to this suit.

The bill then alleges that the plaintiff, Hugh W. Sheffey, administrator of Felix H. Hull, in Virginia, has paid to J. H. Renick under this decree on the balance of the purchase-money due for the purchase of the lands aforesaid from A. G. Mathews the sum of $———, (amount not stated), and to William H. McClintic for Ann Mathews the sum of $———, (amount not stated). So the averments aforesaid state correctly the balance due on the liens aforesaid. This bill further states that one of the plaintiffs in this cause, Elizabeth M. Hull, "has elected to take in money the value of her dower in the lands aforesaid to be invested according to the terms and conditions of the decretal order last aforesaid." The bill then states, that Felix H. Hull in his lifetime sold to Benjamin F. Jackson, his one half of two of these thirteen tracts of land, an interest in which was conveyed to him as aforesaid by Joseph McClintic and wife; and perhaps he also sold to Benjamin F. Jackson other lands, and he collected of him a part of the purchase-money. The bill then sets out the tracts in which the plaintiff, Elizabeth M. Hull, claims dower and the tracts in which her dower interest exists only after the payment of the purchase-money, for which a vendor's lien exists. The bill then concludes as follows:

"But so it is, may it please your honor, the rights and interests of all the parties, since the division of the State, can not be adjusted by decree of the circuit court of Highland, and they are advised that by *comity*, by law and by the jurisdiction cast upon this circuit court of Highland, before the State of West Virginia became a *de jure* government; that your honorable court will render such decree in the

premises as may be just and equitable to all parties and adapted to the nature of their case.

"In tender consideration of the premises, and inasmuch as your orator and oratrix are remediless save in a court of equity, they pray that Edward P., Lillie and Felix H., infant children of Felix H. Hull, deceased, Andrew G. Mathews and James H. Renick, Ann Mathews, William H. McClintic and Mary Ann, his wife, late Mary Ann Mathews, John W. Warwick and Benjamin F. Jackson and Kyle Bright, administrator of Joseph McClung, deceased, may be made parties defendants to this suit and compelled on their several corporal oaths true and perfect answers to make to the foregoing bill as truly, perfectly and completely as if the same were here again repeated, and they thereto severally and specifically interrogated; that a guardian *ad litem* be appointed to defend the infant defendants; that the defendant, Andrew G. Mathews, be compelled to convey in accordance with his covenant and agreement of October 13, 1853; that the amount due him on said article, and which has been transferred to James H. Renick, the amount due Ann Mathews on the lands conveyed by the deed of January 1, 1855, and referred to in the decree of the Highland circuit court (as in the hands of William McClintic), the amount due Kyle Bright, administrator of Joseph McClung, deceased, under the deed of September 26, 1855, the amount which the widow is entitled to receive *lien* of dower in all the lands aforesaid, and in the event that Benjamin F. Jackson has paid all the purchase-money on the lands sold him atoresaid by intestate, then the amount he may be entitled to recover from the personal representative be ascertained by one of the masters of this court; that a decree be rendered directing Hugh W. Sheffey and James Bumgardner, Jr., as commissioners, to make sale of all the lands to which B. F. Jackson may not be entitled to a conveyance, and a conveyance of such or such interest of intestate therein, as he may be entitled to receive; that such sale may be made at such time and place and upon such terms and conditions as may be most advantageous to the interests of all parties; that a decree in harmony and in aid of the decree of the circuit court of Highland be rendered in favor of the widow, by virtue whereof her dower interest in the lands of

Pocahontas county, West Virginia, may be invested in lands in the county of Highland, Virginia; that the undivided interest in the lands owned by intestate be sold without the expense of making partition unless said Warwick insists upon partition, and in the event that he does, that partition be made, and the portion assigned as for that of intestate be sold, and grant unto your orator and oratrix all other, further and general relief as may be deemed just and equitable and adapted to the nature of their case; that your honor will, to the full extent and power of the court, co-operate by decree in aid of the circuit court of Highland, so that the real and personal assets of intestate may be disposed of to the very best interests of the widow, children and creditors of said intestate. And as in duty bound, &c., may the Com'ths, spa., issue, &c., &c."

Answers were filed by J. W. Warwick, James H. Renick, William H. McClintic, B. F. Jackson, Andrew G. Mathews, Kyle Bright, and also a paper called the answer of William Curry, guardian *ad litem*. It is not necessary to state the contents of any of these answers. The contents of the papers will be given in the opinion. On September 5, 1868, the court entered the following decree:

"This cause this 5th day of September, 1868, came on to be heard on the bill of the plaintiffs, the answer of the adult defendants John W. Warwick, James H. Renick, William H. McClintic, Benjamin F. Jackson, Andrew G. Mathews, Kyle Bright, administrator of Joseph McClung, deceased, and the infant defendants Edgar P., Lillie and Felix H. Hull, children and heirs of Felix H. Hull, deceased, by their guardian *ad litem*, Wm. Curry, assigned them for that purpose by the court, general replication to said answers, exhibits filed, and the bill, which is ordered to be taken for confessed as to all the other defendants upon whom process has been duly served and who have failed to appear and answer, and was argued by counsel. And it appearing to the court that a sale of the land in the bill and proceedings mentioned is proper and necessary for the purpose in the bill stated, and it furthermore appearing to the court from the answers of the adult defendants that certain portions of the said land are subject to a vendor's lien for the balance of the

purchase-money due thereon and ought to be sold subject thereto, and that such of said vendor's as have such lien are willing to make title to their respective portions as soon as their purchase-money has all been paid them, and it furthermore appearing to the court that the defendant John W. Warwick is willing to have the undivided interest of the decedent Felix H. Hull in the sixty two acres of land mentioned in the answer of the defendant Warwick sold, in consideration whereof, it is adjudged, ordered and decreed that Sherman H. Clark, the general receiver of this court, who is hereby appointed a commissioner of the court for that purpose, having first given notice of the time and place of sale by publication once a week for four successive weeks in the Monroe Republican, a newspaper published in the county of Monroe, in the Lewisburg Times, a newspaper published in the county of Greenbrier, and in the Valley Virginian, a newspaper published in the town of Staunton, Virginia, and also by posting a notice of same on the front door of the court house of Pocahontas county, do then proceed to sell at public auction to the highest bidder, before the front door of the court house of said county, all the lands of Felix H. Hull, deceased, in the said county of Pocahontas, both divided and undivided, and in such parcels or tracts as the commissioner may deem most advantageous, on a credit of one, two, and three years, with the exception of so much in cash as may be necessary to defray the costs of this suit and the costs of sale, requiring bond and good personal security of the purchaser or purchasers, besides retaining the title of the land until the purchase-money has all been paid, and that he make report of his proceedings to the court at its next term.

"On the day of sale the commissioner is directed to exhibit a plat of the various portions or tracts in which he may propose to make the sale of the land. It is further adjudged, ordered and decreed that the said Sherman H. Clark as general receiver of this court retain the said bonds in his hands to be collected or disposed of by him as the court may hereafter order. The court doth reserve for further adjudication the distribution of the fund arising from the sale aforesaid according to the rights of the widow and the other represen-

tative parties in interest as they appear from the pleadings and proofs in this cause or as they hereafter may be shown."

A survey of all the land deemed necessary to be made by the commissioner was ordered on November 4, 1868 and was made. The commissioner after advertising these lands for sale sold them at public auction on November 27, 1868, and made report thereof to the court, at which sale various parcels of land were purchased by Richard Dudley, S. A. Wilson, John T. Hooff, James A. Price, John W. Warrick, George W. McDonnald, William Gibson, Benjamin F. Jackson and John P. Porter.

On June 7, 1869, the court by a decree confirmed all these sales except the sale to John P. Porter, which was set aside for inadequacy of price. The land sold to him bringing but $25.00 and being of very little value.

Within six months after the infant Felix H. Hull came of age, he asked the circuit court of Pocahontas to give him leave to file his petition and answer in this cause, to re-open the same and set aside among other things the two decrees in this cause above set out. The court granted the leave and this petition and answer were filed October 18, 1882; and process was awarded against the defendants named in it, which was duly executed on all of them. The petition set out all the proceedings above stated in this cause and many others had since the decree last above named was rendered, but which need not be stated nor his objections to them. His objections, so far as it is necessary to state them in this case, were, first, that the petitioner never was a party to this cause, and that no answer of his by a guardian *ad litem* was ever filed; second, that F. H. Hull never had a personal representative in this State; third, that no account of the personal estate of F. H. Hull was ever taken, and yet his lands were sold by order of the court; fourth, that Hugh W. Sheffey, the administrator of F. H. Hull in Virginia, could not be a plaintiff in a suit in this State; fifth, that there was no determination of the amount or priorities of the liens on the lands of F. H. Hull, before his lands were ordered to be sold and actually were sold, that the bill does not present a case for the ascertainment of the general indebtedness of Felix H. Hull, deceased, and that the widow could only ask that

so much of the lands of her husband should be sold, as would satisfy the liens on them, which had priority over her dower, instead of which all of the lands of her husband were ordered to be sold and were sold, and in doing this the decree ordering the sale assumed, that the statement made by Warrick in his answer as to a final division of lands between him and Felix H. Hull was true, there being no proof of its truth; sixth, that the decree confirming these sales was erroneous, because the report of the commissioner of sale was too defective and vague for identification with the land decreed to be sold either with reference to its location, quantity or title; that the lands were sold at grossly inadequate prices; that instead of selling Felix H. Hull's undivided moiety of the 1180 acres of the land named in the bill he sold an entire interest in a part thereof and an undivided interest in 116 acres thereof; that this land was advertised as an undivided interest in 1129 acres and an undivided interest in sixty two acres, and the advertisements were in other respects misleading, and the description of the land to be sold differs in each advertisement, and is incorrect in all of them, and was not published for four successive weeks prior to the sale, and no bond was given by the commissioner of sale and none required of him.

The assignments of error in the subsequent proceedings after the decree last above given I need not state. They were seven in number but have not yet been acted upon by the circuit court. This petition then proceeds as follows:

"Petitioner further says, as allegation of mere facts, that by order of court in this suit a deed was made to Richard Dudley and Samuel A. Wilson for the land purchased by them and John T. Huff, the latter uniting in the deed under previous contract to allow the other two the whole of the land so purchased, they becoming responsible for all the purchase-money. Said Richard Dudley has since departad this life, leaving a will by which his interest in said land was devised to Edwin T. Dudley, Rodney H. Dudley, Alexander P. Dudley and Ernest M. Dudley. A deed for the land purchased by James A. Price was made by order in the suit to John C. Price, and by another order, a deed in which Benjamin F. Jackson and wife united for the land purchased by

the said Jackson was made to T. Jefferson Hiner and Aurelius Gilkerson, and subsequently said Hiner conveyed all his interest in said land and said Gilkerson one sixth of his interest therein to Andrew G. Crawford and William A. Crawford. John W. Warrick, George W. McDannald and William Gibson are in possession of the lands purchased by them respectively.

"By an order of the circuit court of Pocahontas county, West Virginia, the personal estate of said Felix H. Hull, deceased, was committed to Samnel L. Gibson, a former sheriff of said county, as such sheriff, for administration, and by an order of the clerk of the county court of said county, R. S. Turk was appointed administrator of Elizabeth M. Turk, the said widow of Felix H. Hull, deceased, and he has qualified and is acting as such administrator. The said Andrew G. Mathews and Ann M. Mathews have departed this life, and by orders of the clerk of said county court, the personal estate of each was committed for administration to Levi Gay as sheriff of said county. The said James M. Seig has also departed this life, and D. G. McClung was appointed in Pendleton county, West Virginia, as his administrator, and has qualified there, and is acting as such administrator. The suit in which the decrees aforesaid were entered, is styled upon the docket and record of this court, "*F. H. Hull's administrator and widow* v. *F. H. Hull's heirs et als.*" The title to one third of all the land sold under decree in said suit, except the portion sold as the land of Benjamin F. Jackson, descended to the petitioner, upon the death of said F. H. Hull, as one of his three children aforesaid, who constitute his only heirs-at-law. This petitioner is advised and charges that neither of the pretended debts nor any part thereof set up in said suit as payable out of the estate of said F. H. Hull, deceased, are valid and subsisting claims of which payment can lawfully be enforced by a sale of the real estate, or any part thereof, situate in Pocahontas county, West Virginia, belonging to the said F. H. Hull, father of your petitioner, at the time of his death, and that for the reasons hereinbefore shown, such enforcement to the extent of depriving petitioner of all of his said inheritance is erroneous in fact and form.

"This petitioner therefore prays that this his petition may

be read in the said suit of *F. H. Hull's administrator and widow* v. *F. H. Hull's heirs et als*, and considered also as his answer to the bill filed therein, and that all the papers and record of said suit may be read in connection therewith; that the said Hugh W. Sheffey, Benjamin F. Jackson, James H. Renick, Levi Gay, sheriff of Pocahontas county, and as such administrator of Andrew G. Mathews, deceased, and as such sheriff, administrator of Ann M. Mathews, deceased, William H. McClintic and Mary Ann McClintic, his wife, John W. Warrick, Kyle Bright, administrator of Joseph McClung, deceased, Edwin T. Dudley, Rodney H. Dudley, Alexander P. Dudley, Ernest M. Dudley, Samuel A. Wilson, George W. McDannald, Aurilius Gilkerson, Andrew G. Crawford, William A. Crawford, John C. Price, William Gibson, Sherman H. Clark, Lucius H. Stephenson, William Skeen, D. G. McClung, administrator of James M. Seig, deceased, Edgar P. Hull, L. K. Huff and Lillie E. Huff, his wife, R. S. Turk, administrator of Elizabeth Turk, deceased, and Samuel L. Gibson, administrator of F. H. Hull, deceased, may be summoned to answer to this petition; that all appropriate matter hereinbefore set out may be considered as allegations of exception specifically made to the several reports of commissioners appointed and acting in this cause; that all and each of the decrees entered in the suit aforesaid may be reviewed, reversed, set aside and declared void as to this petitioner, and he be adjudged the title and right of possession to, as also the rents and profits since the sale, upon the interest in the said land inherited by him as aforesaid, or if the court be of opinion to refuse this, then that restitution of the proceeds of sale corresponding with such interest be decreed to him from the parties respectively who by this petition and the papers and records of said suit read therewith are shown to have received the same.

"He also asks such other and general relief as the court may see fit to grant."

The purchasers of the land of Felix H. Hull filed a demurrer and answer to this petition setting out, that they had paid all the purchase-money for these lands, and that deeds had been made for the lands to them severally by subsequent orders of said court; that the lands sold for their full value,

as the report of the sales showed. They insist that the decree of the court of September 5, 1868, shows that the infants including the petitioner, Felix H. Hull, did answer by their guardian *ad litem;* and that this is conclusive on this point. These answers are long and argumentative; but the only fact stated in them not appearing in the record is found in the conclusion, which is, that the respondents have been in actual possession of the lands purchased ever since the sales were confirmed, and have made valuable improvements on the same. The answers of B. F. Jackson and J. H. Renick relate only to matters not before this Court for review.

On October 18, 1883, the following decree was entered:

"More than three months having elapsed since the filing of the petition of F. H. Hull in this cause, and the service of a subpœna upon the resident defendants Levi Gay, sheriff of Pocahontas county, and as such administrator of Andrew G. Mathews, deceased, and as such sheriff and administrator of Ann M. Mathews, deceased, William H. McClintic and Mary Ann, his wife, John W. Warwick, Kyle Bright, administrator of Joseph McClung, deceased, John C. Price, William Gibson, S. H. Clark, D. G. McClung, administrator of J. M. Seig, deceased, R. S. Turk, administrator of E. M. Turk, deceased; Samuel L. Gibson, administrator of F. H. Hull, deceased; and the petitioner having regularly proceeded against the absent defendants, Hugh W. Sheffey, A. Gilkerson, A. G. Crawford, W. A. Crawford, L. H. Stephenson and William Skeen by order of publication, and they still failing to appear and answer, said petition as to them is taken for confessed; and these causes coming on this day to be heard upon the papers formerly read; the said petition of F. H. Hull filed in the cause aforesaid, taken for confessed as aforesaid, the joint answers and demurrer of Edwin T. Dudley, Rodney H. Dudley, A. P. Dudley, E. M. Dudley, S. A. Wilson and George W. McDannald, and the separate answer of J. H. Renick, and the separate answer and demurrer of Benjamin F. Jackson to said petition, with general replication thereto, and joinder in said demurrers, was argued by counsel. Upon consideration whereof, it is adjudged, ordered and decreed that said demurrer be overruled *pro forma;* and the court being of opinion that there is no equity in the petition of the

petitioner aforesaid, so far as it seeks to set aside and cancel the sales of lands made under former decrees in the said cause, it is further adjudged, ordered and decreed that the petition be dismissed so far as it refers to setting aside and cancelling said sales made to the defendants aforesaid, and that said defendants recover from said plaintiff in said petition their costs about their suit in this behalf expended; and the hearing of all other questions are reserved and the cause continued."

From this decree Felix H. Hull has been granted an appeal to this Court.

R. S. Turk for appellant.

R. L. Parish and *J. Bumgardner Jr.* for appellee.

GREEN, JUDGE:

We will first consider what errors, if any, there are in the decree of sale made on September 5, 1868, for which it would have been reversed, had it been appealed from and supeseded prior to the sale of the lands, of which Felix H. Hull died seized. In the first place it is obvious, that Hugh W. Sheffey, the administrator of Felex H. Hull in Virginia, could not properly be a plaintiff in this cause, whether we regard it as a suit brought to obtain the dower of the widow of Felix H. Hull or as a suit brought to subject to the payment of the debts of Felix H. Hull the lands, of which he died seized. As the adminisrator of Felix H. Hull in Virginia he had no right to institute a suit of any sort in this State. But even had he qualified as administrator of Felix H. Hull in this State, he clearly had no right to institute this suit. When this suit was instituted, the administrator had nothing whatever to do with the real assets of his intestate. The first time authority was conferred on an administrator in this State to bring under any circumstances a suit in equity to subject his intestate's real estate to the payment of his debts was by the Code of West Virginia, chapter 86, section 7, which took effect April 1, 1869, nearly a year after the institution of this suit. The misjoinder of a plaintiff might be fatal in a common law suit; but it would not be fatal in a chancery cause, when he was as in this case a party, who on the face of the bill had no interest whatever in the cause. In such a case, though his

name had not been stricken out as a plaintiff by an order of the circuit court, as it might have been, still on appeal it would not be ground for reversing any decree, which would have been proper, if such party having no interest in the cause had not been made a co-plaintiff. The making of such a person a party co-plaintiff would not render the bill multifarious. All that was said by him in the bill not bearing on the matter, in which relief was sought by the bill, would be treated by the appellate court as mere surplusage. Stripped of all this surplusage including all that it said with reference to obtaining decrees in the circuit court of Pocahontas county to aid and co-operate with the circuit court of Highland county which was all obviously foreign matter, this case must be regarded simply as a bill filed by the widow, Elizabeth M. Hull, to obtain her dower in her husband's lands in this State. The widow could not bring a suit to have the lands of her husband sold and out of the proceeds after deducting the value of her dower to have the residue paid to the creditors of her husband and the balance, if there should be any, to the heirs. This would be a creditors' bill, which she could not bring; and if this bill can not be regarded as a creditors' bill, neither can it be converted into a creditors' bill by petition of creditors or in any other manner.

If her children, the heirs of her husband, had been adults, perhaps the court below could have ordered a sale of all the lands of her husband in this State, in which she was entitled to dower, as a mode of assigning her dower, and could have partitioned the proceeds among the parties entitled thereto including the vendors of the lands, who had vendors' liens upon these lands superior to the widow's right of dower, if the heirs all adult had consented to this mode of assigning the widow's dower. Of course these vendors would be proper parties defendant to such a suit, but persons having liens on these lands, which were not superior to the widow's right of dower in them, and the general creditors of the intestate would not have been proper parties defendant in such a suit; for a widow has no right to bring a suit to subject the intestate's lands to the payment of her husband's debts. She can not bring a creditor's bill. In fact no one but a creditor could have brought such a suit at the time this suit was in-

stituted in 1858, though by the Code of West Virginia chapter 76, section 7, p. 506 a personal representative of an intestate may under circumstances now bring such a suit.

If a creditor holding a vendor's lien was to bring a suit to enforce his lien after the death of the intestate, the proper parties to such suit would be the widow and heirs of the intestate, there being in such case no necessity before the sale to ascertain the amount and priorities of other liens. (*Cunningham* v. *Hendricks*, 23 W. Va. 580, syl. 4.) All the parties to this suit to enforce a vendor's lien against an intestate's land are the vendor, the widow and the intestate's heirs; and these were the only necessary and proper parties to this suit. I have said in such a suit as this brought by the widow against the adult heirs of her husband and those having vendor's liens or other liens superior to the widow's right of dower perhaps the court with the consent of these adult heirs, when they were all adult, might sell the lands of the intestate and assign the widow her proportion of the proceeds, distributing the balance of the purchase-money among those vendors, who had liens superior to the widow, and among the heirs being all adults according to their respective rights. But the right of the court even under these circumstances with the consent of all the adult heirs might be questionable. It is true, that the heirs could themselves sell such real estate, when the intestate died solvent, and the lands in the hands of the purchaser would not be liable, provided the sale was *bona fide* and not made to defraud the intestate's creditors by depriving them of the real assets of the intestate, which the statute-law makes liable for the payment of all the debts of the intestate, and provided such sale was made before a suit had been instituted to subject the land. (See § 3 of ch. 131 of the Code of Va. of 1849, and § 5, ch. 131 of Code of Va.; and § 3 of ch. 86 of Code of W. Va., and § 5 of ch. 86 of Code of W. Va., and *Rex* v. *Creel*, 23 W. Va., pages 379 and 380.)

But if the court in a suit brought by the widow against the adult heirs of the intestate could by consent of all parties sell all the intestate's lands and confer a perfect title on the purchaser, there would seem to be danger, that the creditors of the intestate, who could not be made parties to such a suit, might

be defrauded out of the real assets of the intestate, which the law makes liable for their debts. For in such suit I do not see, how the court could make enquiry, as to whether the sale asked to be made by all the parties was or was not *bona fide*, or whether there might not be a suit elsewhere pending to subject the real assets to the payment of the intestate's debts. But in such a suit brought by a widow against the heirs of her husband for her dower, even though they be all adult, yet if any one of them objects to the sale of all the lands and an assignment of the widow's dower in money and a payment of the balance of the proceeds of the sale, to the heirs according to their respective rights, though the other heirs consent to this, could it be fully proven, that it is obviously to the interest of the widow and all the heirs, that all the lands should be so sold, it is not competent for the court to decree such sale. This is a necessary deduction from the case of *White* v. *White*, 16 Grat. 264, syl. 1 and 2.

In that case the suit was brought by an adult heir against the widow and other heirs for an assignment of dower. The bill alleged, that "though the estate is a large one, yet from its peculiar condition dower can not be alloted to the widow nor partition made among the children without great injury to the parties; and their interest will be promoted by a sale of the entire subject, and the assignment of dower and the disposition of the proceeds of sale according to the rights of the parties." It was fully proven by the evidence, that the interest of all parties would be promoted by such sale and distribution of the proceeds of sale; but the widow insisted on an assignment of her dower in land by metes and bounds. In their opinion the court say, pp. 367 and 368: "The court is of opinion, that, as it is not made to appear, that it was impossible to assign the appellant her dower of and in the real estate of her husband, it was not competent for a court of equity in the exercise of its general power to decree a sale of the whole property and to provide a compensation in money to the appellant in lieu of dower against her will and without her consent, however much it might be to the interest of the heirs at law of the decedent to have a sale of the whole estate and a monied compensation allowed the appellant instead of a sale of two thirds of the estate and the remainder subject to the

life-estate of the widow. And the court is further of opinion, that the widow entitled to dower in the estate of her deceased husband is not a joint-tenant, coparcener nor tenant in common with the heirs at law within the meaning of the statute concerning partition in the Code of Virginia, (Code of 1860 ch. 124, p. 581, Code of W. Va., ch. 79, p. 486); and therefore no power is conferred by that statute upon a court of equity to sell the whole estate against her will and without her consent, and to compel her to receive a monied compensation out of the proceeds in lieu of dower."

We may infer from this, that, if the widow had consented, the sale of all the lands might have been made, even though some of the heirs objected or did not consent. And that would have been so in that case, because the suit was brought by one heir or coparcener to partition their lands and to assign a dower. Now the statute of partition, (Code of Virginia of 1860 chapter 124 p. 581, Code of West Virginia chapter 79, p. 486) provides that in a suit for partition among coparceners: "Where partition can not be conveniently made, if the interest of all will be promoted, a sale of the entire subject may be made, even though some of these be infants." Of course this means necessarily without the consent of all the coparceners. This could not have been done at common law or without this statute. If the widow brings a suit for her dower and partition among the heirs, as she is not a coparcener, this statute can not apply, and the court of equity has only its general powers independent of statute-law; and under these general powers it could not without the consent of all sell the lands. If all consented, I should think it doubtful, whether a court of equity would entertain the suit, as then there would be no sort of necessity for any action by the court, as the owners of the land could by consent without the aid of the court sell the lands and divide the proceeds. But if dower is also to be assigned, the interposition of a court of equity becomes necessary to estimate in the particular case the pecuniary value of the widow's dower in money. My conclusion therefore is, that in no suit brought by a widow for her dower in lands, to which the heirs have a legal title, has the court a right to decree the sale of the husband's lands without the consent of the heirs, and there-

fore, if the heirs or any of them were infants, as the consent of an infant can not be given, the court can not in such case decree a sale of the lands of the intestate.

This reasoning is all based on the supposition, that there is no lien on the land superior to the widow's right of dower. Let us now consider what effect the existence of such lien would have upon the widow's right to have the land sold, and her dower assigned out of the proceeds. This matter was considered in *Daniels et al.* v. *Leitch*, 13 Grat. There the husband had bought a tract of land, upon which was a deed of trust for a large amount, and the deed of trust authorized the trustee to sell the whole and not a part of the tract to pay this large debt. The husband died, and the widow brought a suit, in which her infant children the heirs of her husband were made defendants and also the administrator of her husband and the trustee and the *cestui que trust*. She set out that her husband's personal estate would not pay his debts, and it would become necessary to sell this tract of land, and that it was to her interest and that of her infant children, that this tract of land be sold and with the personal estate be applied to the payment of her deceased husband's debts, and the residue of the proceeds invested for the benefit of her and of her children; and she alleged, that such sale would be greatly beneficial to her children, and she asked a settlement of the administrator's accounts. Upon the proof of these facts the court ordered a sale of this tract of land, and the land was sold, the purchase-money paid and the deed of trust released. The purchaser becoming alarmed about the title filed a petition in this suit and asked to have this sale set aside and his purchase-money returned. Thereupon the guardian of these infant children filed his bill under the statute of selling the lands of infants, set out these facts and asked, as the lands had been sold at a high price, that the sale might be approved and the purchaser quieted in his title. All the proceedings in this suit were in strict conformity to the statute for selling infant's lands. The purchaser denied that he had got any title to the land, the sale in the suit by the widow being invalid and null, and as the other parties had a right to repudiate this sale, he should not be held bound by it. A creditor of the intestate also filed a bill asking on behalf of himself and all other creditors,

this sale be enforced, which the purchaser in his answer insisted ought not to be done.

These three causes were heard together; and the circuit court held, that no sale of the land could properly be made in the widow's suit, and released the purchaser and directed the money, which he had paid, to be refunded, and after some other proceedings ordered this tract of land to be again sold. On an appeal from these decrees the appellate court held, that the court had a right to order the sale of this tract of land in the suit brought by the widow, basing its opinion in part on the facts, that in that case this tract of land was liable primarily to the payment of the debt secured by the deed of trust, as the intestate had bought the land subject to the deed of trust. The court based their opinion in part on the fact, that the deed of trust provided, that if the semi-annual interest on the debt secured was not paid promptly, or the principal sum, $5,000.00, was not paid when demanded, the *trustee should sell the whole tract of land for cash.* But it held, that if there had been a defect in the title conveyed to the purchaser in the widow's suits, it was not incurable, and it might and ought to have been cured by a decree of confirmation of the title in one or both of the other suits; that after the purchaser had permitted the sale to be confirmed without objection, he had no right to be discharged from his contract, even though no title was conveyed, unless the defect was either incurable or such as can not be cured in a reasonable time. The decrees were accordingly reversed, and this ordered to be done. The conclusion to be drawn from this case is, that where the husband did not have the legal estate in the land but only an equity of redemption, the debt to be paid out of the land being superior to the widow's right of dower, a court of equity is not necessarily confined in the assignment of her dower to assign it by metes and bounds or in a common law mode, but when the interest of the widow and of the heirs will be promoted by a sale of the real estate and a payment of the debt, which is a lien upon it, especially when the debt is primarily payable out of the land and not out of the personality, and the whole tract of land may of right be sold by the trustee of the creditor to pay the debt, the court may sell the whole tract of land

and assign the widow her dower, when she has brought a chancery suit for the purpose, even though the heirs be infants. But nevertheless a court of equity unless under peculiar circumstances in assigning dower to the widow in an equity of redemption in land should follow the law and assign her dower in the common law mode giving her one third in value of the equity of redemption and assigning to her by metes and bounds her dower, leaving the residue of the lands in the hands of the heirs first liable to the payment of the debt.

It would follow that if the land is subject to a vendor's lien, only the legal title being in the heirs of the husband, and a suit is brought by the widow in a court of equity against the infant heirs of the intestate, a court of equity under its general power could not sell the whole tract of land and give the widow her dower out of the proceeds, even though it should be made to appear, that the interest of the infant heirs would thereby be promoted. If, however, the husband had purchased the land and had paid for it in part, but had no deed therefor, but only a contract entitling him to a deed upon the payment of the purchase-money, a court of equity under its general powers could sell the whole land and assign the widow her dower in the proceeds of the land in a suit brought by her for her dower, even when the heirs were infants, if their interest would be thereby promoted; but such a power it ought not to be exercised except under peculiar circumstances, and having ascertained the value of her dower-interest it should assign it to her by metes and bounds leaving the residue of the land in the hands of the heirs liable to the payment of the balance of the purchase-money due or selling a sufficiency of it to pay this balance of the purchase-money.

My conclusion therefore is, that the court in this case, all the heirs being infant defendants, and the suit having been brought by the widow for an assignment of her dower, had no power to decree a sale of any of the lands, when the legal title of the lands was in the husband in his lifetime. And it was not proper for the court to decree the sale of any of the lands, which the husband had purchased and paid for in part during his lifetime; first, because there were no peculiar

circumstances stated in the bill, which would justify such a decree of sale; and, second, because there was not a particle of proof, that the interest of the infant-heirs would be promoted by a sale; and lastly, because there was no answer filed in the cause by their guardian *ad litem*, without such answer the court had no power or authority to sell any of the lands of these infants, whether their title to them was legal or only equitable.

Against these conclusions the appellee's counsel have relied greatly upon certain recent Virginia decisions. These decisions are not binding authority on this Court; and on the points, on which they are relied we decline to follow them, because we regard them in violation of fundamental principles. The first of these cases and the one principally relied upon is *Zirkle* v. *McCue et al.*, 26 Grat. 517, decided in 1875. It was one of those cases, in which because of the results of the late war and the fact, that Confederate treasury notes became utterly valueless, the grossest injustice would have resulted to the parties, if the court had not reached the conclusion which it did. Doubtless this had great weight with the court and influenced them to lay down some propositions of law in that case. It was a suit brought by a widow for her dower against the heirs of her husband, some of whom were infants. She states in the bill, that she is the guardian of her infant children, who were among the heirs of her husband; (but it is very apparent on the face of the bill, that she did not sue for herself as widow and as the guardian of her infant children.) She states, that it is probable that the interest of all the parties would be promoted by a sale of the land, but says she is willing to take her dower in kind or out of the proceeds of a sale, if that be adjudged best. She made the administrator of her husband a party defendant also, and asks that such decrees may be made as are necessary for the final adjustment of the rights of all parties in the whole estate real and personal. On June 16, 1863, the court by a decree assigned dower to the widow in kind, but then, on the ground that the interest of all the heirs would be promoted by a sale of the residue of the land and a division of the purchase-money, it ordered a sale of the balance of the land. It was sold, and the sale

was confirmed by a decree in November, 1863, and as the purchasers paid all the purchase-money, by the same decree it was ordered, that deeds be made to them which was done. The purchase-money having been paid in Confederate notes and they having become valueless, so far as the interest of the infant heirs in the land was concerned, in 1871 these infants by their next friend, their mother, instituted a chancery suit to review these decisions and set them aside and restore them to their rights; and the circuit court did set aside said sales, as they affected the interest of the infants in said suit, and directed that each of the plaintiffs then infants be allotted their share of the land so purchased by metes and bounds. The court of appeals reversed this decree. Judge Staples in pronouncing the opinion of the court on pages 526 and 527 says:

"But if it be conceded that according to strict right, a suit for partition can not be maintained by a person occupying the position of both guardian and widow, still if a bill is filed by such person for assignment of dower and in the progress of the suit the court having all the heirs before it shall ascertain that their interest will be protected by a partition or sale, there would seem to be no reason why it should not decree accordingly instead of turning the parties around to a new suit. It would simply be a decree between defendants. Such an irregularity, if it be one, would clearly not be sufficient to reverse the proceedings and vacate the sales as against a purchaser for value clothed with the legal title."

This suit being really brought by the widow in her own right to obtain her dower and for the assertion of certain other rights, and not being formally brought by her as guardian of her children, and the bill further showing, that she did not mean by it to demand anything whatever as guardian of her children, the fact, that it was stated in the bill, that she was their guardian, ought to have been, it seems to me, regarded as mere surplusage and as not changing the suit at all, and that it was really a simple suit by the widow in her own right only. All that is said in this extract from the opinion of the court is based on the assumption, that the fact, that she was the guardian of her children, was an important matter as altering the character of the suit. It is tacitly admitted, that, had she not

been guardian of her children, and had this not appeared on the face of the bill, the decree of the circuit court setting aside the decree of sale and the decree confirming the sales and restoring these infants to their original rights must have been affirmed. So that, so far as the case before us is concerned, I regard this decision as sustaining the views of the appellant in this case; for in this case the widow was not the guardian of her infant children. But had she been, it would not in my opinion in the least degree alter the case. As stated in the above extract from the opinion in *Zirkle* v. *McCue et al.*, the suit was brought for an assignment of dower, and it was assigned. How according to fundamental principles was it possible for the court to go on and ascertain, whether the interest of the defendants would be promoted by a sale of the lands belonging to them? The widow had not a shadow of interest in this question; and certainly there can be no decree rendered in any case between co-defendants, except when it is based upon pleadings and proofs between the plaintiff and defendants. I need scarcely cite authorities to sustain this fundamental principle, (but see *Vance* v. *Evans et al.*, 11 W. Va. 342, syl. 1.) This fundamental principle is obviously violated in this part of the opinion of the court in *Zirkle* v. *McCue et al.*, 26 Grat. 527; and it is therefore disapproved.

Durrett v. *Davis, guardian et als.*, 24 Grat. 302, was another of those cases, in which any other decision than that reached by the court would have operated great injustice to the parties, resulting from the fact, that the purchase-money of the land was paid during the war and invested in Confederate bonds or in certificates of the debt of the State of Virginia and became wholly or in a large measure valueless to the infant heirs, who doubtless sought to set aside the sales because of such accidental loss. But they showed, as I conceive, fatal errors in the decree ordering the sale of the lands, and if the court had reversed the decree of sale, in all probability the purchaser would have lost the land, which he had fairly purchased and paid for, though the court does not decide this point, because they held, there was no fatal error in the decree ordering the sale. Yet on pages 517 and 518 the court on this question say: "Whatever may be the current of au-

thorities in other States, the question may be regarded to some extent open in Virginia. The tendency of opinion has been that the title falls with the reversal of the decree, except so far as the sale is within the influence of the statute." The court referred to the statute in Code of Virginia, ch. 178, § 8, p. 735, Code of West Virginia, ch. 178, § 8, p. 735. The court being under this pressure approved the decree ordering the sale. Judge Staples in delivering the opinion on pages 310 and 311, says: "It is true, it does not appear, that the answer of the guardian *ad litem* was sworn to. But it may have been done in open court, and the entry omitted by the clerk, or the paper containing the endorsement lost or mislaid during the war, at the time the public records were taken from the office and concealed in the country. We are not to presume that the able and efficient judge then occupying the bench was ignorant of a plain provision of the statute requiring such oath, or that he would have received and acted upon an answer not in conformity with these provisions. Every reasonable intendment should be made in this Court in favor of the regularity of the proceedings below, when the contrary does not plainly appear. And this upon the maxim, *Omnia præsumuntur rite esse acta.* More especially ought this to be the case in favor of a *bona fide* purchaser for value in support of a sale clearly established to be for the benefit of the infant at the time it was made."

In reference to this I have only to say, that to my mind it was a plain and palpable misapplication of the maxim referred to; and if such violent presumptions are to be made by an appellate court, then no decree of a circuit court could ever be reversed, for we can always imagine that the court has made some order correcting the blunders in his decrees as the record was presented to the appellate court, and that the clerk has through inadvertance omitted to put it on the record. The decision of the court in that case was based on the presumption, that this answer of the *guardian ad litem* was sworn to, which was not shown by the record. The decision was made in 1874 and is not binding authority on this Court and is by us disapproved. If the record had not shown what was the answer filed by the *guardian ad litem*, but it had been lost, and the decree stated it had been filed, then it

might have been presumed, that it was a proper answer and sworn to. But as the record showed on its face what was the answer of the *guardian ad litem*, and that it was not sworn to, there was no room left for presumptions.

In the case before us the decree of September 5, 1868, says among other things, that the answer came on to be heard on "the answers of the infant defendants Edgar P., Lillie, Felix H. Hull, children and heirs of Felix H. Hull, deceased, by their guardian *ad litem*, Wm. Curry, assigned them for that purpose by the court." It is error to decree the sale of infants' lands without an answer has been filed by the guardian *ad litem*. This recognition of Wm. Curry as the guardian *ad litem* of these infants is a sufficient appointment of him as such; and the enquiry remains: Did he file an answer? The Code of Virginia of 1860 was then in force as the law of this State. Section three of chapter one hundred and twenty eight of Code of Virginia of 1860 p. 590 provides that, "to every infant there shall be appointed a guardian *ad litem*, who shall answer the bill on oath." This decree recites that these infants by their guardian *ad litem* did file an answer. In the English practice all the papers, as bill, answers, &c., on which it is recited in a decree a cause came on to be heard, are copied at length into the decree, so that the decree entered on the record-book constitutes a complete copy of the record of the cause. In our practice instead of copying into the decrees the bill, answers, &c., they are simply referred to in the decree and are then treated as a part of the decree, precisely as though they had been copied at length in them, the clerk in whose custody are the papers of the cause, identifying the bill, answers, &c., referred in the decree. In this case the clerk has sent up as the answers of these infant-defendants by their guardian *ad litem* the following paper:

"This respondent for answer to said bill or to so much thereof as he is advised it is material for him to answer unto, considereth and saith that the defendants are infants of tender years; that he knows nothing certainly of the facts stated in the bill; that he does not therefore admit the allegations in the bill but requires full proof thereof, and places the rights and interests of said infants under the care and

protection of this honorable court. Having fully answered, &c., he prays, &c."

At the foot of this paper is the following form of an affidavit:

"POCAHONTAS COUNTY, to-wit:

"This day William Curry, guardian *ad litem* as aforesaid made oath before me that all the facts stated in the foregoing answer are true to the best of his knowledge and belief. Given under my hand this———day of———1868."

We must regard this paper as if copied into this decree of September 5, 1868, ordering the sale of these infants' lands as the answer of the guardian *ad litem* stated in this decree to have been filed. If this paper can not be regarded as an answer, then we must regard the recital in this decree, that the cause was heard among other things on an answer of these infants by their guardian *ad litem* as contradicted on the face of the decree, and therefore as not true. Now it seems to me apparent, that this paper can not be regarded as the answer of Edger P. Hull, Lillie Hull and Felix H. Hull, infants, by their guardian *ad litem*, William Curry. The name of neither William Curry nor any of these infants appear on this paper at all. It is not signed by William Curry nor by any attorney for him. It would just as well be an answer of any other infants as of those heirs of Felix H. Hull. It is not sworn to as the law then required, that it should be; and there could be no presumption, that it was ever sworn to because at the foot of this paper is an affidavit drawn for William Curry, but which affidavit was never made, as appears on the face of it, as there is not to it the signiture of any officer. We might as well regard a piece of blank paper as an answer as this piece of paper totally unmeaning on its face and not even showing whose answer it was intended to be. This decree of the sale of infants' lands was made September 5, 1868, when no answer had been filed by their guardian *ad litem*. This alone is sufficient to reverse the decree, because these infants were not before the court, when the court decreed a sale of these lands.

It remains now to determine, whether if this decree is reversed, as it must be for the reasons which I have stated, the title of the purchasers made at the sale under this decree,

which sales have been confirmed by the court, can be affected by such reversal. When this decree was made, the Code of Virginia of 1860 was in force in this State. It provided in chapter one hundred and seventy-eight, section eight: "If a sale of property be made under a decree or order of a court, *after six months from the date thereof*, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled." In this case the decree of sale was made September 5, 1868; and the sale was made in less than three months thereafter, on November 27, 1868. This statute has then no application in this case; but if it did apply, I would not regard it as leading to any different conclusion from that which I have reached. In examining this question it will suffice to show, that if we regard as law what is said by Judge Staples upon this point in *Zirkle* v. *McCue et als.*, 26 Grat. 529, still the title of the purchasers under this decree of September 5, 1868, must for the reasons we have stated fall, if this decree is reversed. The decision of this case made in 1875, is of course not binding authority upon us, and as I have said, there is much in it, which we do not approve; but as Judge Staples in that case reviews at some length the Virginia authorities on the subject under consideration, and as I do not deem it necessary to review them in this case, I will simply quote his conclusion which is thus expressed:

"These extracts, and others that might be given, show that while this court has never gone as far as the courts of other States in favor of purchasers at judicial sales, it has on all occasions, manifested a very strong disinclination to interfere with the rights of such purchasers, unless upon palpable and substantial errors in the proceedings and decrees under which such titles are acquired."

Assuming this to be a correct conclusion from the decisions in Virginia made prior to the formation of this State and binding on us as authority, I am clearly of opinion, that as the decree of sale of September 5, 1868, was made without a particle of evidence of any sort, from which the court could have concluded, that the interest of the infants, the sole

owners of these lands, would be promoted by such sale, and as upon this as well as other grounds this decree must be reversed, the title of the purchasers at the sale made under this decree must fall with the reversal of the decree; for this surely constitutes a *palpable and substantial error in the proceedings and decree.*

But the conclusion, which I have reached, that the titles of all the purchasers of lands under this decree must be set aside and fall with the reversal of the decree, I prefer to put upon higher grounds, grounds which would necessarily lead to this result in any State in this Union. All the decisions agree, that in order to protect a purchaser at a judicial sale, which has been confirmed, the court making the decree of sale must have competent jurisdiction not only over the parties whose lands are to be sold but also over the subject-matter, that is, shall have power to render a decree of sale. The Supreme Court of the United States as well as the courts of appeals in many of the States hold, that, where the court has competent jurisdiction of the parties and a discretion to decree a sale, although the judgment-order in ordering the sale of lands may be reversed, yet all rights acquired at a judicial sale, while the decree or judgment was in force, and which it authorized, will be protected. It is sufficient for the buyer to know, that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. (*Gray* v. *Briguardeth*, 1 Wall. U. S. R. 627–634; *Thompson* v. *Tolman*, 2 Peters R. 168; *Voorhes* v. *Bank of United States*, 10 Peters R. 449 and Rover on Judicial Sales, sec. 63 pages 30 and 31, and authorities there cited, and especially *Abbe* v. *Wood*, 6 Mass. 79 and Rover on Judicial Sales, pages 60, 61 and 62 and sections 138, 139, 140 and 141 and the authorities there cited.) The Virginia authorities have not gone this far in protecting purchasers at sales, except where they are protected by the statute before referred to. (*Zirkle* v. *McCue et als*, 26 Grat. 528; *Capehart* v. *Dowry*, 10 W. Va. 130; *Underwood* v. *Peck*, 23 W. Va. 704; *Haymand* v. *Camden*, 22 W. Va. 180; *Poppenheimer* v. *Roberts*, 24 W. Va. 702.) But even on the decisions of the Supreme Court of the United States and of some of the States other than

Virginia it is clear, that the purchasers under the decree of September 5, 1868, in this cause can not be protected; for the court obviously had no jurisdiction to enter this decree of sale, as it had no jurisdiction of the infants, whose lands were decreed to be sold, they never having appeared in the cause by guardian *ad litem*, the only way in which they could have appeared. This decree therefore can not protect any of the purchasers under it. When this decree is reversed, because these infants were not before the court, the title of the purchasers necessarily falls in the reversal of the decree, for the reason that it was from the beginning void and of no effect. This court had, as we have seen, no authority to order the sale of any of the lands of these infant-defendants, even if they had answered the bill by their guardian *ad litem*, when they had the legal title to the lands. The court having no jurisdiction to decree such sale in this cause, the purchasers of such lands can not be protected by such decree, though the court has confirmed the sales made to them; and on a reversal of such decree the title of such purchasers must fall with such reversals. The title of most of the purchasers of these lands would thus fall, even if the guardian *ad litem* had filed an answer for the infant-defendants.

The decrees of October 18, 1883, of June 9, 1869, and of September 5, 1868, must all be reversed, set aside and annulled; and the appellant must recover of the appellees Edwin F. Dudley, Rodney H. Dudley, Alexander P. Dudley, George W. McDonald, Samuel A. Wilson, E. M. Dudley, Benjamin F. Jackson and James H. Renick their costs in this Court expended; and this cause must be remanded to the circuit court of Pocahontas with instructions to put all parties *in statu quo* by requiring all persons, who have received any of the purchase-money of said lands to refund the same with interest and by refunding to the purchasers any money, which they may have paid on their purchases with interest from the time, when it was paid, and allowing them compensation for all permanent improvements put upon the land bought and by requiring them to pay for the rents and profits of said lands from June 9, 1869, and by doing all other things necessary and proper to put all persons *in statu quo* and, if necessary, to modify or change the above suggestions

as to the mode of so doing in any way, which under the actual circumstances of the case may be found necessary; and the court shall otherwise proceed with this cause according to the principles laid down in this opinion and further according to the principles governing courts of equity.

REVERSED. REMANDED.

JUNE TERM.

WHEELING.

EX PARTE MOONEY.

Submitted June 9, 1885.—Decided June 10, 1885.

In *habeas corpus* a judgment remanding the prisoner can not be superseded.

The facts of the case are fully stated in the opinion of the Court.

J. O. Pendleton and *W. W. Arnett* for petitioner.

Alfred Caldwell, Attorney-General, for the sheriff.

JOHNSON, PRESIDENT:

John Mooney was by a jury of Ohio county found guilty of "*unlawfully* but not maliciously wounding, &c., one McAdams with intent to maim, disfigure, disable and kill him," and upon such verdict Hon. J. J. Jacob, the judge of the circuit court of Ohio county, who presided at the trial, entered judgment, that said Mooney be confined in the penitentiary of this State for one year *and* pay a fine of $100.00. The said Mooney on the 5th day of June sued out a writ of *habeas corpus* before the Hon. George E. Boyd, one of the

judges of the circuit court of Ohio county, and claimed his discharge, on the ground that said judgment and sentence was illegal and void. On the same day the return was made by the sheriff of Ohio county, that he detained said Mooney under said judgment of the circuit court of Ohio county. To this return the prisoner demurred, and the judge overruled the demurrer and remanded the prisoner. To this judgment remanding the prisoner he applied to one of the judges of this Court for a writ of error, which on the said 5th day of June last was granted; and on the same day the clerk of this Court issued a writ of error *with supersedeas*, which was duly served on the 6th day of June. On the morning of the 8th day of June last, the said sheriff with full knowledge, that said writ of *error and supersedeas* had been served removed said prisoner from the jail of Ohio county and conveyed him to the penitentiary of this State. The above facts were on the 9th day of June duly set forth in the affidavit of the prisoner's counsel, who prayed that by proper process the said prisoner might be returned from the penitentiry to the jail of Ohio county, there to remain until the said writ of error can be heard and determined by this court.

If the judgment of the judge, who remanded the prisoner, were in fact superseded before the prisoner was removed to the penitentiary, we would unhesitatingly by proper process require the prisoner to be placed, where he was, when that judgment was rendered, and would also punish for contempt those who had thus disregarded the legal process of this Court. But if the said judgment was not legally superseded by the writ of error and *supersedeas*, then no one for disregarding such process would be punished for a contempt of such process. (*Swinburn* v. *Smith*, 15 W. Va. 483; *Ruhl* v. *Ruhl*, 24 W. Va. 279.)

It is insisted by counsel for prisoner, that the judge of this Court, who granted the writ of error, granted a *supersedeas* to the said judgment at the same time, and that the clerk of this Court in pursuance of said order issued a writ of error and *supersedeas*. If this be true, it could not avail the prisoner, unless the judge had authority to grant such *supersedeas*. If he had no such authority, this Court would of course dismiss the *supersedeas* or not regard it.

The question then to be considered is: Could the judgment of the judge remanding the prisoner under our statute be suspended? At common law according to the current of authority a judgment in *habeas corpus* can not be reviewed on writ of error. (Hurd on *Habeas Corpus* 573, and cases cited.) The decision was not regarded as final and repeated applications might be made. In our State, the judge who issues the writ can either discharge, admit to bail, or remand the prisoner, and any such judgment entered of record shall be conclusive, unless it be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action of false imprisonment. (Code, chapter 111, section 10.)

By section one of chapter one hundred and thirty-five of the Code, as amended by chapter one hundred and fifty-seven of the Acts of 1882, an appropriate writ for review is allowed "in any case of *quo warranto*, *habeas corpus*, *mandamus* or prohibition." The Code does not provide that it shall be by a writ of error, or *supersedeas*, or both; but if the statute-law does not elsewhere contain a prohibtion to grant a *supersedeas* in such case, this chapter gives such authority to the Court.

Is there any such prohibition in any statute? Section twelve of chapter one hundred and eleven of the Code, which is in full force and vigor and is not inconsistent with section one of chapter one hundred and fifty-seven of the Acts of 1882, declares in reference to the judgment in *habeas corpus*, "when the prisoner is remanded the execution of the judgment shall not be suspended by the writ of error or suspended for the purpose of applying for one." This means, that the judgment *remanding* the prisoner shall not be suspended either by the judge, who rendered the judgment, for the purpose of applying for a writ of error, or by the writ of error when granted; nor shall any *supersedeas* accompany the writ of error, for the judgment remanding the prisoner *shall not be suspended* for any purpose. This is clearly shown by the eleventh section, which declares: "If during the recess of the Supreme Court of Appeals the Governor or the President of the Court should think the immediate revision of any such judgment to be proper, he may summon the Court for that purpose to meet on any day to be fixed by

him." If a *supersedeas* could issue to keep the prisoner *in statu quo*, why the necessity of convening the Court in special term to try the writ of error, more than any other case, where the prisoner pending a writ of error and *supersedeas* is languishing in jail under what he deems an illegal sentence, and under which, unless a *supersedeas* intervene, he will be removed to the penitentiary? Evidently to the legislative mind it appeared proper that in executing the criminal law, after a party had been tried by one court, and judgment had been pronounced against him, and he had applied for a *habeas corpus*, and the judge granting the writ had remanded him, the rule should be that he must be placed in the precise position in which he was before the writ issued; but that in case of emergency the appellate court might be convened, if not at the time in session, to review cases of peculiar hardship. This general rule applies to every case, whether or not any other judgment had been rendered against the prisoner.

If the *judgment* remanding the prisoner can not be suspended, then under such judgment the prisoner is in precisely the same condition in which he was, before the writ issued. The effect of the writ was to take him for the time from under the force of the other judgment and sentence against him, and it was in the power of the judge issuing the writ to forever relieve him from such judgment and sentence by discharging him therefrom; but when he *remands* him, he places him back under the force and effect of such sentence, and he is in precisely the same condition, as if the writ had not issued; and as the judgment remanding him was not and could not be superseded or suspended, there was nothing to prevent him from being removed to the penitentiary under and by force of the judgment and sentence of the circuit court of Ohio county. A writ of error to that judgment would under the statute, if procured before he was thereunder removed to the penitentiary, have operated as a *supersedeas* and suspended the said judgment and sentence, and left him in the jail of Ohio county, until the writ of error in that case could have been heard in the appellate court.

He is not now without remedy. His writ of error to the judgment of the judge remanding him can be heard by this Court; and if it is found, that he was illegally detained in

custody, this Court will reverse the judgment of the judge, which remanded him, and proceeding to render such judgment, as said judge ought to have rendered, will discharge him. But upon said hearing if we should find, that the judgment, under which he is held, is not void but only erroneous, we would affirm the judgment remanding the prisoner, and he would then be driven to his writ of error to the judgment of the circuit court of Ohio county to correct any errors therein.

As the judgment remanding the prisoner could not be suspended or superseded, there was nothing to prevent the removing of him to the penitentiary under the judgment of the circuit court of Ohio county; and we must therefore decline to issue any process to bring the prisoner from the penitentiary to the jail of Ohio county, to await the action of this Court on his writ of error. If we find upon a hearing of said case, that the judge ought to have discharged him instead of remanding him, we will then release him from the penitentiary and from imprisonment, but we have no authority to do so now.

WRIT REFUSED.

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38 64
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42 243
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WHEELING.

EX PARTE MOONEY.

Submitted June 16, 1885.—Decided June 27, 1885.

1. Upon proceedings in *habeas corpus*, if the petitioner deems the return insufficient, he should not demur to it but move the court to discharge him. (p. 39)

2. Jurisdiction in proceedings on *habeas corpus* in cases, where the detention is by commitment under legal process, is not strictly speaking a power of revision but a power to arrest a void order or judgment. It acts *directly* on the effect of the order or judgment but only *collaterally* on the order or judgment itself. It can not, therefore, be made a substitute for a writ of error or *certiorari*. (p. 39.)

3. When a party is imprisoned under a judgment or order of a court having jurisdiction to make such order, he can not be discharged on *habeas corpus*, however erroneous such judgment or order may be; but it is otherwise if the court had no jurisdiction to make the order or judgment. (p. 41.)

4. Where a court has jurisdiction of the subject-matter and of the person, and it pronounces a severable judgment or sentence, one part of which is authorized by law and another distinct part is not so authorized, the prisoner will not be discharged on *habeas corpus*, when it does not appear that he has undergone the full punishment imposed by the legal portion of the sentence. (p. 43.)

5. Under the provisions of section nine of chapter one hundred and eighteen of Acts of 1882 the court sentenced a party, found guilty of unlawfully wounding with intent to main, disfigure, disable and kill, to confinement in the penitentiary for one year and to pay a fine of one hundred dollars, HELD:

Such a party is not entitled to be discharged on *habeas corpus*.

The facts of the case are sufficiently stated in the opinion of the Court.

J. O. Pendleton and *W. W. Arnett* for plaintiff in error.

Alfred Caldwell, Attorney General, for the sheriff.

SNYDER, JUDGE:

Upon the petition of John Mooney, alleging that he was detained, confined and restrained of his liberty by W. C. Handlan, sheriff of Ohio county, in the jail of said county, without authority of law, a judge of the circuit court of said county on June 5, 1885, in vacation awarded a writ of *habeas corpus*, commanding said sheriff to produce before him the body of said Mooney, together with the cause of his being detained. The respondent on the same day produced before the judge the said Mooney, and in his return stated that he detained him by virtue of a judgment of the said circuit court, dated May 16, 1885, a copy of which is made part of his return. From this copy it appears, that the petitioner, Mooney, was tried by said court upon an indictment and by the verdict of a jury "found guilty of unlawfully wounding Frank McAdams, with intent to maim, disfigure, disable and kill him," and that upon said verdict the court pro-

nounced judgment, "that the prisoner, John Mooney, be conveyed to the penitentiary of the State and confined therein for the period of one year, and treated therein as prescribed by law, and that he pay a fine of $100.00," and the costs, &c.

The petitioner demurred to and moved to quash the return as insufficient. The judge overruled said demurrer and motion and remanded the petitioner; and he thereupon obtained this writ of error.

The statute under which said indictment was found and judgment pronounced is as follows:

"If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury, with intent to maim, disfigure, disable or kill, he shall, except when it is otherwise provided, be punished by confinement in the penitentiary not less than two nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, at the discretion of the court, either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars."—Sec. 9, chap. 118, Acts 1882.

It is contended for the petitioner, that this statute did not authorize the court to sentence the petitioner to confinement in the penitentiary and also to pay a fine; but that the only construction of it is, that the court may sentence him to the penitentiary simply; or it may sentence him to confinement in jail and to pay a fine; and that by no reasonable interpretation of it can the court unite a fine with confinement in the penitentiary. And it is, therefore, claimed, that inasmuch as the court has sentenced the petitioner to the penitentiary and also to pay a fine, it has exceeded its jurisdiction, and as a consequence the whole sentence or judgment is void, and the petitioner is entitled to be discharged on *habeas corpus*.

Whether or not this is the true interpretation of the statute, it is unnecessary, and, perhaps, improper, to decide in this proceeding; as it is not the only construction that can by any possibility be given to it, the proper mode of having it construed is by writ of error to said judgment and not by this collateral proceeding. But conceding for the purposes of this writ of error, that such is the true and only proper construc-

tion of the statue; and that the court committed a manifest blunder in pronouncing the sentence it did, then the vital question is presented: Is the petitioner illegally detained by the sentence?

Before discussing this question, I deem it proper to consider a matter of practice and to state some of the general principles governing the courts in cases of *habeas corpus*.

The petitioner in this case demurred to the return and moved to quash it as insufficient. In some cases this has been allowed, but the better, and what now seems to be the settled practice is for the petitioner, if he deems the return insufficient to move to discharge the prisoner. On this motion the return is conceded to be true, and unless it shows sufficient cause for the detention of the prisoner he will be discharged. *Cunningham* v. *Thomas*, 25 Ind. 171; *Watson's Case*, 26 Eng. C. L. 237.

The writ of *habeas corpus* is applicable to two distinct classes of cases. First. Where the restraint or detention is by private authority; and second, when the detention is by commitment under legal process. The latter class is all that need be considered in this case. In this class the jurisdiction is, in a general sense, appellate in its nature; because the decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*; and the writ must always be for the purpose of revising that decision, and therefore is appellate in its nature. *Ex Parte Bollman*, 4 Cranch 75.

Appellate jurisdiction in the sense it is here used does not necessarily import a subordination of one court or officer to another, although that is its more usual signification. It signifies the power to act judicially upon a question or right, notwithstanding a supposed conclusion against it resulting from an alleged judgment. It is not, strictly speaking, a power of revision, which includes properly the power to affirm or reverse the judgment or order, and so establish or destroy it; but a power to arrest the execution of a void judgment or order. It acts directly on the effect of the judgment, that is on the imprisonment; but only *collaterally* on the judgment itself. The jurisdiction, therefore, under the writ of *habeas corpus* over the judgment or order relied on

to justify the imprisonment is only *collaterally* appellate. Hurd on *Habeas Corpus*, (330) 324.

It is the general rule that, where the return shows a detainer on legal process, the existence and validity of the process are the only facts upon which issue can be taken. 3 Hill, *appendix*, 658, note 30; *People* v. *Cassel*, 5 *Id.* 164.

If there is enough on the face of the process to protect the officer who executed it from an action of trespass or false imprisonment the prisoner will not be discharged under *habeas corpus*. *Bennac* v. *People*, 4 Barb. 31.

The jurisdiction over the process being only *collaterally* appellate, as we have seen, *habeas corpus* can not have the force and operation of a writ of error or *certiorari*, nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities which render the proceeding voidable only; but with those radical defects which render it absolutely void. A proceeding defective for *irregularity* and also one void for *illegality* may be reversed upon error or *certiorari;* but it is the latter defect only which gives authority to discharge on *habeas corpus*. *Ex Parte Van Hogan*, 25 Ohio St. 426; *In re Schenck*, 74 N. C. 607, 610; *Ex Parte Virginia*, 100 U. S. 339; *Petition of Semler*, 41 Wis. 517.

An *irregularity* is defined to be a want of adherence to some prescribed rule or mode of proceeding; and it consists, either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. Tidd's Pr. 434. It is the technical term for every defect in practical proceedings or the mode of conducting an action or defence, as distinguishable from defects in pleadings. 3 Chitty's Gen. Pr. 509.

Illegality is, properly, predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguishable from mere rules of procedure. It denotes a complete defect in the proceedings. Tidd's Pr. 435; *Ex parte Kellogg*, 6 Vt. 509.

It would be *irregular* to sentence a person to imprisonment in his absence, where the absence was occasioned by the order of the court pronouncing the sentence. It would be *illegal* to sentence him to imprisonment for a crime which was pun-

ishable by pecuniary fine only. *Ex parte Gibson*, 31 Cal. 619; *Petition of Crandall*, 34 Wis. 177.

Wise rules of procedure established for the regulation of other judicial proceedings are not to be discarded in that of *habeas corpus* when they are applicable. One of these rules is, that when a record or process is only *collaterally* brought into question, it can not be invalidated for error or irregularity. Hurd on *Habeas Corpus* (2d. Ed.) 328 and cases cited. Therefore, where a party is imprisoned under a judgment or order of a court having authority to make the order, he can not be discharged on *habeas corpus*, however erroneous such judgment may be; but it is otherwise if the court had no authority to make the order or jurisdiction to pronounce the judgment *In Re Blair*, 4 Wis. 522; *People* v. *Cassells*, 5 Hill 164; *State* v. *Toule*, 41 N. H. 540; *Williamson's Case*, 26 Pa. St. 9; *Matter of Eaton*, 27 Mich. 1.

It is a rule essential to the efficient administration of justice, that where a court is vested with jurisdiction over the subject matter upon which it assumes to act, and regularly obtains jurisdiction of the person of the defendant, it becomes its right and duty to determine every question, which may rise in the cause, without interference from any other tribunal except an appellate tribunal, where its judgment may be revised by writ of error or *certiorari*; but this supervisory jurisdiction can not be exercised upon the collateral proceeding by *habeas corpus*. *Merrill* v. *Lake*, 16 Ohio 374, 405; Bac. Abr., *Certiorari*, A.; *Thompson* v. *Hill*, 3 Yerg. 167; *Smith* v. *McIver*, 9 Wheat. 532.

Errors which render the judgment merely voidable and do not make it absolutely void, can not be enquired into under a writ of *habeas corpus*. *In Re Prime*, 1 Barb. 340; *State* v. *Shattuck*, 45 N. H. 211; *Riley's Case*, 2 Pick. 171; *Ex Parte Watkins*, 3 Pet. 201.

If the judgment is in excess of that which the court rendering it had by law the power to pronounce, such judgment is void for the excess only. *Brook's Case*, 4 Leigh 669; *Murray's Case*, 5 *Id.* 720, 724; *Hall's Case*, 6 *Id.* 615, 618; *People* v. *Lipscomb*, 60 N. Y. 560; *Feeley's Case*, 12 Cush. 598; *Ex Parte Shaw*, 7 Ohio St. 81; *People* v. *Markham*, 7 Cal. 208; *People* v. *Baker*, 89 N. Y. 467.

Proceeding now, in the light of these rules and principles of law to determine the direct question: Is the prisoner *illegally* detained by the respondent under the sentence of the court set forth in the return in this case?

It is not questioned that the circuit court of Ohio county had jurisdiction of the subject-matter, and that it had also regularly acquired jurisdiction over the petitioner to render judgment against him. It is insisted, however, that as the court had no legal right under the statute to sentence the petitioner both to confinement in the penitentiary and to pay a fine, it exceeded its jurisdiction, and thereby the whole proceeding became illegal and void. In support of this view the cases of *Ex Parte Page*, 49 Mo. 291; *Rex* v. *Ellis*, 5 Barn. & Cress. 395; and *Rex* v. *Bonne*, 7 Ad. & Ellis 58, are relied on by counsel for petitioner. The two latter cases were decided upon writs of error by the court of king's bench, and by reason of the peculiar constitution of that court, the determination of such cases by it have no analogy to the proceeding by *habeas corpus* in our courts. I do not, therefore, regard those cases as authority in this case. The other case from Missouri, was in some respects different from the one before us. In that case the extreme limit which the court could inflict as a punishment for grand larceny was fixed by statute at seven years confinement in the penitentiary; but the court sentenced the petitioner to such confinement for that crime for ten years. The court on *habeas corpus* held, that the trial court by that sentence had exeeeded its jurisdiction, and therefore, under the provisions of the statute of that State, the petitioner was discharged. The statute referred to declared, that when a prisoner is brought up on *habeas corpus*, it it appear that he is in custody by virtue of process from any court or judicial officer, he can be discharged only in one of the following cases: "First, where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person. * * * * Sixth, where the process is not authorized by any judgment, order or decree, nor by any provision of law." Wagn. Stat. 690, sec. 35.

The judge, who delivered the opinion of the court, after quoting said statute, says: "It seems to me that the court in passing the sentence exceeded its jurisdiction in the matter,

and that it did not act by authority of any provision of law. This application, therefore, I think comes within the meaning of the statute." 49 Mo. 292.

It seems clear from the opinion that the court decided that case under the influence of the statute; and, consequently, it can be no precedent, and can have no application in a State like ours, where no such statute exists.

But, if that case could be regarded as decided upon principle, it must be disapproved, since it is not only contrary to the general rules hereinbefore stated, but it is in positive conflict with numerous other and seemingly better considered decisions of courts of other States. *In Re Petty*, 22 Kan. 277; *Ex Parte Parks*, 93 U. S. 18; *People* v. *Jacobs*, 66 N. Y. 9; *People* v. *Liscomb*, 60 *Id.* 559; *People* v. *Baker*, 89 *Id.* 460.

In the case before us, the sentence is severable, which it was not in the Missouri case; and it is unquestionable that the court had authority to inflict either of the punishments it did upon the petitioner; that is, it could have sentenced him to confinement in the penitentiary for one year, or it could have sentenced him to confinement in jail and to pay a fine. It is well settled as shown in the preceding part of this opinion that when the judgment or sentence is in excess of that which the court by law had authority to pronounce, it is void as to the excess only. *A fortiori* would a severable sentence be void only as to the excess. As to that part, which the court had the power to pronounce, the sentence is necessarily valid in a proceeding upon *habeas corpus*, because in such proceeding the court has no power to modify or correct the sentence. As the proceeding is collateral to the judgment, the court in this proceeding can only discharge or remand the petitioner. If the judgment is void it will discharge him, but if it is not void, though it may be erroneous and voidable, this Court must remand him and nothing more. We can only render such judgment here as the court below should have given *in this case* and we can not interfere with the judgment in the collateral case in which the judgment was pronounced—that can be done only upon writ of error to that judgment. Sec. 26, chap. 157, Acts 1882, p. 512.

In the matter of Sweetman, 1 Cowen 144, 149, "When a special session found S. guilty of petit larceny, and sentenced

him to imprisonment for thirty days, and imposed a fine of $15.00; also adjudged that unless the fine should be paid, he should be imprisoned for the term of four months; *held*, that the sentence was good for the thirty days, but void for the four months." And the court refused to discharge S. on *habeas corpus*, but remanded him to prison.

In *Ex Parte Van Hagan*, 25 Ohio St. 426, the petitioner had been sentenced to imprisonment for six months, when under the statute in force, the sentence could not exceed thirty days, on *habeas corpus* the court held: "The punishment inflicted by the sentence in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void. It follows," says the court, "that a writ of error to reverse the proceedings or sentence is the remedy that the relator should have resorted to in order to obtain a discharge from illegal imprisonment, and not *habeas corpus* which is not the proper mode of redress, where the relator was convicted of a criminal offence and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction." 25 Ohio St. 432.

Numerous other cases, some of which have been hereinbefore cited, might be referred to in support of the doctrine thus announced; but without repeating them, it is deemed sufficient to state, that after careful research, I have been unable to find any case, where there has been a discharge on *habeas corpus* from a sentence, severable in itself and good as to part but void as to a separate and distinct part, pronounced by a court having competent jurisdiction to render the valid portion of the sentence, unless at the time the discharge was asked the petitioner had undergone the full punishment imposed by the valid portion of the sentence.

For the reasons stated I am of opinion, that the order remanding the petitioner be affirmed.

AFFIRMED.

WHEELING.

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WAMSLEY, ADM'R. *v.* WAMSLEY.

Submitted June 13, 1885.—Decided June 27, 1885.

An administrator, or other fiduciary, has authority to submit to arbitration any suit or matter of controversy touching the estate or property of his intestate or beneficiary without having first obtained the permission of the circuit court to do so in the manner prescribed by section five of chapter sixty-three, Acts 1882; and an award made pursuant to such submission will not be set aside merely because the submission was made by the fiduciary without a compliance with the directions of said statute.

The facts of the case sufficiently appear in the opinion of the Court.

C. H. Scott and *L. D. Strader* for plaintiff in error.

No appearance for defendant in error.

SNYDER, JUDGE:

By an agreement in writing entered into between Jacob W. Wamsley and Samuel B. Wamsley, dated September 13, 1883, they agreed to submit to the determination of two arbitrators and their umpire a controversy then existing between the former as administrator of Andrew M. Wamsley, deceased, and the said Samuel B. Wamsley and providing therein, that the award when made should be returned to and entered as the judgment of the circuit court of Randolph county. The arbitrators and umpire met and made their award, by which they awarded, that the said Jacob W. Wamsley as administrator of Andrew W. Wamsley, deceased, should recover from the said Samuel B. Wamsley $841.50 with interest, &c.

The award was filed in the circuit court of Randolph county and the court made a rule thereon summoning the defendant, Samuel B. Wamsly, to show cause why it should not be made the judgment of said court. The defendant appeared and filed two answers to the rule. In the first he avers that by reason of the statute passed March 2, 1882, no personal representative can lawfully submit any matter to arbitration

affecting the estate of his decedent without having first obtained leave to do so from the circuit court in the manner prescribed by said statute and as no such leave was asked or obtained by the plaintiff in this case the said award is void and of no effect. The second answer was not considered or acted upon by the court below, and it is, therefore, unnecessary to refer to it further than to state that it alledged fraud on the part of the plaintiff in the procurement of the award and asked that it be set aside for that cause.

The court, on January 14, 1885, upon consideration of the said first answer to the rule, held that the matters alleged therein rendered the award null and void, and thereupon entered an order setting the same aside. From this order the plaintiff, Jacob W. Wamsley, as administrator, obtained this writ of error.

The only question to be decided in this case is, whether the ruling of the circuit court, that the statute referred to in the defendant's first answer rendered the award void, is correct?

The said statute, in substance, provides, that a personal representative or other fiduciary may file his petition in the circuit court asking permission of the court to submit to arbitration any suit or matter of controversy touching the estate or property controlled by him as such representative or fiduciary, that he shall state the facts in his petition, upon which he seeks such permission, and the court may grant or refuse the prayer of the petitioner. If the petition is filed in good faith and the prayer granted, an order shall be made showing the granting of such permission and be entered on the chancery order-book of the court, and the award made in any such case shall be binding upon all the parties in interest and may be entered as the judgment of the court, as awards in other cases; and if the petition is filed in good faith, and there was no fault or neglect on the part of the fiduciary, he shall not be responsible for any loss sustained by an award adverse to the interests of the estate which he represents. Section 5, chapter 63, Acts 1882, p. 121.

The court of appeals of Virginia in *Wheatley* v. *Martin*, 6 Leigh 62, decided that it is competent for an executor or administrator to submit to arbitration any controversy concerning the estate, whether the estate claims to be a debtor

or a creditor; that this results necessarily from the full dominion which the law gives him over the assets and the full discretion which it vests in him for the settlement and liquidation of all claims due to and from the estate. And so far as relates to debtors and creditors, parties to the award, it is binding upon the legatees and distributees in the same manner, as if the adjustment had been made by the executor or administrator without an award, in virtue of the general powers belonging to his fiduciary character. This is simply the announcement of the common law rule, that a fiduciary as such might submit to arbitration matters affecting the estate or trust represented by him; and that an award made in pursuance of such submission would be binding upon the parties to the same extent that it would be if made between parties acting in their individual rights. 3 Leonard 53; 1 Lomax on Ex'rs. (1st Ed.) 356.

The same rule is announced in *Nelson* v. *Cornwell*, 11 Grat. 724, decided in 1854, but upon a controversy, which arose prior to the enactment of section five, chapter one hundred and fifty-three of the Code of 1849, and therefore said statute had no effect upon said decision.

In both of these Virginia cases the court held, that notwithstanding the administrator had the right to submit to arbitration any claim for or against his intestate's estate, and an award made thereon was binding, still, if injustice was thereby done to, or loss sustained by such estate, the administrator may be chargeable therefor as for a *devastavit*.

To relieve the apparent harshness of this rule in its operation upon the responsibility of the fiduciary, the statute-law was amended by the Code of 1849, by declaring that: "No such fiduciary shall be responsible for any loss sustained by an award adverse to the interests of his ward, insane person or beneficiary under any such trust, unless it was caused by his fault or neglect." Code of Va., sec. 5, chap. 153.

This statute was seemingly too liberal, in the opinion of the legislature, in relieving the fiduciary from responsibility, and it therefore amended it by adopting the statute of 1882, before mentioned which requires the fiduciary to act not only without fault or neglect in order to excuse himself from responsibility for an adverse award, but it requires him, in good

faith, to file a petition, stating the facts to the circuit court and then obtaining the permission of that court to submit any fiduciary claim to arbitration, before he can claim exemption from liability for an adverse award even though it was not "caused by his fault or neglect."

This statute, neither expressly nor by fair implication, manifests any purpose to alter the common law rule as to the validity or binding effect of an award made without complying with the directions of the statute; and, therefore, the reasonable conclusion is, that the statute of 1849 was enacted to relieve the responsibility of the fiduciary in cases of an adverse award, and that the statute of 1882, was intended to qualify and add certain prerequisites as conditions, upon which such release from responsibility should be granted; and that neither of them was intended to affect the validity of the award, or to take away the authority of the fiduciary to submit any matter to arbitration without doing so in the manner prescribed by the said statute of 1882. *Tennant* v. *Divine*, 24 W. Va. 387, 391.

I am, therefore of opinion, that the circuit court erred in setting aside the award, upon the ground set forth in the defendant's first answer to the rule, and that its judgment should be reversed, and the case remanded to said court for a trial upon the matters alleged in the defendant's second answer to the rule, or any other matters that may be proper in the case and not inconsistent with this opinion.

REVERSED. REMANDED.

WHEELING.

QUAKER CITY NAT'L BANK *v.* SHOWACRE.

Submitted June 4, 1885.—Decided June 27, 1885.

1. Where a plea or replication is allowed by the court and the record shows that the opposite party objected to the filing of the same, and that his objection was overruled, such party may have the question raised by such objection reviewed by the appellate court,

although he did not except to the action of the court overruling such objection. (p. 50.)

2. A defendant files a plea under the provisions of the fifth section of chapter one hundred and twenty-six of the Code, and the plaintiff files a special replication thereto, in which he alleges facts, which if true would entitle him to a verdict; the defendant rejoins generally; a trial is had on this issue and a verdict is found for the plaintiff. HELD:

That although said chapter of the Code provides, that every issue of fact upon such plea shall be upon a general replication, yet if the defendant could not have been prejudiced by the allowance of said special replication, this Court will not reverse the judgment on the ground that it was improperly allowed. (p. 51.)

3. A note is dated at a specified place, which is stated on its face, and is drawn in a form which makes it at such place a negotiable instrument. HELD:

The maker, when sued on such note by an innocent holder for value, will not be permitted to aver or prove such note was not in fact made at the place it purports on its face to have been made. (p. 52.)

4. A paper purporting to be a bill of exceptions and copied into the record as such will not be regarded or treated by the appellate court as a part of the record, unless the record shows that it was, by some order or memorandum entered on the order-book of the trial-court, made a part of the record. (p. 53.)

The facts of the case are fully stated in the opinion of the Court.

McConnel & Meighen for plaintiff in error.

J. L. Parkinson for defendant in error.

SNYDER, JUDGE:

Writ of error to the judgment of the circuit court of Marshal county in an action of debt brought by the Quaker City National Bank against W. H. Showacre. The action is on a note for $500.00, which the declaration avers was made by the defendant at Bellaire in the State of Ohio, payable to the order of John Cree twelve months after date, and that before its maturity the same was endorsed to the plaintiff for value.

The defendant against the objection of the plaintiff was allowed to file several pleas under the statute alleging that the note was executed by him in the county of Marshall in this State and setting up as defences that the execution of the note was procured by fraud and that the consideration had wholly failed, &c. To these pleas the plaintiff tendered a special replication avering therein that the note upon its face shows that it was made and dated at Bellaire in the State of Ohio, that by the laws of that State it is a negotiable instrument and as such was, before its maturity, endorsed to plaintiff for value without notice of any defect or that it was not in fact made in Ohio as it purported on its face; and that, therefore, the defendant is estopped to set up the defences alleged in his said pleas. The defendant objected to the filing of this replication, but the court permitted the same to be filed and the defendant rejoined generally thereto. A trial was had by jury and a verdict and judgment for the plaintiff, and the defendant obtained this writ of error.

It is alleged here that the court erred in overruling the defendant's objection to the filing of the said special replication. The plaintiff, however, insists that the defendant can not allege this as error in this Court, because he failed to except to the ruling in the court below.

It has been expressly decided by this Court, that a party may take advantage in the appellate court of an error committed by the trial-court in permitting a plea to be filed where the record shows that such party objected to the filing of such plea in the trial-court, and that he need not in such case take a bill of exceptions or except to the action of the court overruling his objection. *Bank* v. *Kimberlands*, 16 W. Va. 557; *Perry* v. *Horn*, 22 *Id.* 381.

This rule is equally applicable to the filing of a replication. In this case the defendant did object to the filing of the replication and he is, therefore, entitled to have the action of the trial-court as to that ruling reviewed by this Court.

The first objection is, that under the statute it was error to permit any special replication to be filed to said pleas. The pleas as before stated, set up defences allowed under the one hundred and twenty sixth chapter of the Code; and the sixth section of said chapter provides, that every issue of fact upon

such pleas "shall be upon a general replication that the plea is not true and the plaintiff may give in evidence, on such issue, any matter which could be given in evidence under a special replication, if such replication were allowed." Code, p. 609.

In *Douglass* v. *Central Land Co.*, 12 W. Va. 502, this Court decided that, "Though an issue be not made up on a special plea, yet if the evidence to sustain it was admissible under the general issue, and *non assumpsit* had been pleaded, the Court ought not to reverse a judgment on a verdict for such irregularity when all the evidence is certified and sustains the verdict. Upon such pleadings, though all the evidence had not been certified, yet if the plea be such that the *plaintiff could reply no special matter* without a departure from the allegations of his declaration, but *could only take issue on the pleas*, the non-joinder will be cured by the statute of jeofails after verdict." See also *Bank* v. *Kimberlands*, 16 W. Va. 555; *Huffman* v. *Alderson*, 9 *Id.* 616.

The special replication filed in this case did not put in issue any facts alleged in the pleas of the defendant, but it averred matter of estoppel, and it is not, therefore, certain that the statute was intended to preclude such a replication. But assuming that such was the effect of the statute, then this Court must regard the replication as a nullity and treat the case as though it had not been filed. The case would then show that a trial was had without any issue on pleas to which the plaintiff could reply no special matter, but could take issue only by a general replication. In this view, under the authorities above cited, this Court would not reverse the judgment if it appears from the record that the plaintiff in error was not prejudiced by such irregularity.

The statute declares, that the plaintiff may give in evidence on an issue made by general replication to the plea any matter which could be given in evidence under a special replication. The plaintiff then, without said special replication, could have proved the very matters alleged therein, and as the jury found for the plaintiff we must presume that the facts alleged in the special replication were proved before the jury; and, consequently, if the facts so alleged would entitle the plaintiff to a verdict and judgment, it is apparent from the record that the defendant was not prejudiced by said replica-

tion and this Court ought not to reverse the judgment. This brings us to the enquiry whether or not the matters alleged in the replication if proved on the trial, as we must presume they were, would authorize a verdict for the plaintiff?

It appears to be the settled law, that an inland bill which, upon its face, shows a foreign place and date as the place it was made, will as to innocent third parties be held to be a foreign bill. Thus for instance, for some reason, a Boston merchant, temporarily in New York, draws his bill on a New York merchant, payable in New York, but dates it at Boston; such bill would be held to be foreign in relation to innocent third parties who became interested in it in the belief that it was what it purported to be. *Lenning* v. *Ralston*, 23 Pa. St. 137; 1 Pars. on B. & N. 57; 1 Dan. on Neg. Inst. 869.

As a general rule, commercial law applies the same construction to all negotiable instruments, and it is always careful to protect the rights of innocent holders of such instruments. Upon principle there can be no distinction in such matters between bills and notes. In either case the innocent holder has the right to presume that the drawer or maker intended to produce all the consequences to which his acts naturally and necessarily tend. In the case at bar the defendant advertised upon the face of the note that it was made at Bellaire in the State of Ohio. In that State a note, such as described in the pleadings, is a negotiable instrument as we judicially know and as we are bound to presume the defendant knew at the time he signed it. The necessary and natural inference, therefore, is that the defendant, by signing and putting in circulation such note, intended that purchasers of it should receive it under the belief that it was made at the place stated thereon and that it was a negotiable note. The question, then, is whether the defendant shall be compelled to perform his contract in the sense in which he intended the opposite party should understand it, or in the sense contemplated only by himself, and entirely excluded by the face of the instrument. All writers of authority on questions of morals agree that promises are binding in the sense in which the promisors intended at the time that the promisees should receive them. There can be no plainer principle of equity than that which requires every one to speak the truth, if he choose to

speak at all, in matters which affect the interests of others. He that knowingly misrepresents a fact for the purpose of inducing another to part with his money or goods is held to his representation in favor of a party who confided in it. It is upon this principle that the maker of a negotiable instrument is not allowed to impair its value in the hands of a *bona fide* holder, by denying the existence of a consideration, or by otherwise showing that it is not what it purports to be. By reason of the fact that the note in this case showed on its face that it was dated in the state of Ohio, where by law it was a negotiable instrument, it gained a value and currency which it could not otherwise have received. I think, therefore, both in law and morals the defendant is precluded from averring or proving that said note was not in fact made as it purports in the state of Ohio. He by his act gave it credit as an Ohio note, by the laws of which state it is negotiable, and he was not, therefore, in law prejudiced by having it so regarded on the trial in this case. There was, consequently, no error committed to his prejudice by reason of the fact that said special replication was permitted to be filed, certainly no error for which this Court ought to reverse the judgment against him.

The plaintiff having acquired the note before its maturity for value, without knowledge of any facts which might impeach its validity between antecedent parties, held it by a good title unaffected by such facts. *Bank* v. *Johns*, 22 W. Va. 520; *Johnson* v. *Way*, 27 Ohio St. 374.

Several other errors were assigned by the plaintiff in error and argued in this Court, but each of them is based on bills of exception, which are not by any order or memorandum of the court below made parts of the record. It is too well settled to require any argument or citation of authorities, that unless that which purports to be a bill of exceptions and copied into the record as such, is by some order or memorandum of the trial-court entered on the order-book, made a part of the record, this Court can not regard it or treat it as a part of the record in the case, but will wholly disregard it.

For the reasons aforesaid, I am of opinion that the judgment of the circuit court should be affirmed.

AFFIRMED.

WHEELING.

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STURM *v.* FLEMING *et al.*

Submitted June 10, 1885.—Decided June 27, 1885.

1. When a decree appealed from consists in part of an order of reference for a report upon certain specified matters and for such other matters, as the commissioner may deem pertinent or be required by any party, if such order is justified by the pleadings and proofs as to the matters specified, this Court will not, before such report is made and acted upon by the court below, reverse or consider the order, because some party under said general clause may require irrelevant or improper matter to be reported to the court. (p. 58.)

2. The payment of taxes on land by a purchaser thereof at a judicial sale, which is subsequently set aside and declared void, will be treated as a full satisfaction of all the taxes on such land for the time they shall have been so paid; and the owner of the land so sold will not forfeit his title thereto by reason of his not having had the land assessed and the taxes paid thereon in his name during the time the taxes were so paid by such purchaser. (p. 59.)

The opinion of the Court contains the facts of the case.

Edwin Maxwell for appellant.

A. F. Haymond and *John Bassel* for appellee.

SNYDER, JUDGE:

This is the second time this cause has been before us, as will appear from the report of it in 22 W. Va. 404. It is, therefore, deemed unnecessary to do more here than to refer to said report for a history of the cause and the questions presented and decided up to that date. The present appellant, John Chaltant, and other defendants, after the cause had been remanded, filed answers to the plaintiff's bill in the circuit court, which were replied to generally.

The substance of the appellant's answer is that he became the purchaser of the thirty acres and two acres and sixteen poles of land sold under a decree in a suit in equity of *Fleming* v. *Sturm et als.*, in the plaintiff's bill mentioned; that he had long since paid all the purchase-money and obtained a

deed therefor; that at the time he purchased, the proceedings in said suit were, as they still are, regular on their face; and he insists that his purchase can not be avoided or affected by any proof thereafter taken to show that said proceedings were irregular; that the remedy of the plaintiff, if he has any, is complete at law, and equity has no jurisdiction; that he has no personal knowledge of the judgments mentioned in the plaintiff's bill, but he is informed that all of said judgments and said decree were paid off and discharged more than five years prior to February 6, 1873, and he, consequently, denies the right of the plaintiff to have the same reversed or declared void and to recover the money paid thereon, and that he does not know where the plaintiff was when said decree and judgments were rendered, but he does not admit that he was within the military lines of the so-called Confederate States.

The answers of the other defendants are of similar import and effect, and none of them expressly denies any material allegation of the plaintiff's bill. But whether they do so or not is unimportant in the present state of the cause, as every essential allegation of the bill was fully proven by the evidence in the record before the hearing.

At the January term, 1885, more than seven months after his original answer had been filed and all the evidence taken, the appellant, when the plaintiff submitted the cause for hearing, tendered to the court and asked leave to file his supplemental answer to the bill. The plaintiff objected, *first*, because said answer was tendered too late, and *second*, because the matters alleged therein were immaterial, and the court refused to permit the same to be filed. The said supplemental answer is sworn to, and omitting the formal portions, is as follows:

"Defendant says that he took possession of the tract of thirty acres of land and the lot of two acres and sixteen poles of land soon after he purchased the same, he thinks in 1865, and has ever since that time and now holds actual possession thereof adverse to the plaintiff Sturm and to all other persons, and that for all of the years from 1869 to 1884, both years inclusive, he has had the said lands entered upon the books of the commissioners of the revenue for the county of

Harrison, where they are situated, and had them charged with taxes thereon for all of the said years, and has paid all of the taxes so charged, except those charged for the years 1883 and 1884, for which years he has not yet settled with the sheriff, and that for all of the years from 1869 to 1884, both years inclusive, neither of the said tracts is or was entered upon the said books and charged with any taxes in the name of the said petitioner, Sturm, whereby this defendant claims that all of the title of the said Sturm in and to the said lands has become forfeited and vested in this defendant, if the said Sturm would otherwise have any title thereto."

On January 25, 1885, the cause was heard and the Court entered a decree declaring void as to the plaintiff the judgments recovered against him and another, in the year 1864, by Fleming, Ogden, Billingsley, Fortney, administrator, Strickler, Monroe and Martin in the plaintiff's bill mentioned; also the decrees of March 17, 1864, and June 12, 1864, in the said suit of Fleming against the plaintiff and others, and the sales of the tract of thirty acres of land and of the lot of two acres and sixteen poles of the plaintiff made by commissioners Despard and Maxwell under decree in said suit, and adjudging said judgments, decrees and sales void as to the plaintiff and setting them and each of them aside as to him. The said decree then proceeds as follows:

"That said Sturm (the plaintiff) be restored to the possession of said tract and lot of land, and a writ of *habere facias possessionem* is awarded to said Sturm, to be directed to the sheriff of Harrison county, to cause him to have possession of said lands. It is further adjudged, ordered and decreed that this cause be referred to F. Y. Hornor, a commissioner of this Court, to ascertain and report what amount, if any, was paid on the said judgments of Solomon S. Fleming, Charles E. Billingsley, Seldon M. Ogden, John M. Fortney, administrator of Joshua Robinson, deceased, Emory Strickler, William Monroe and George W. Martin, Jr., out of the proceeds of the tract of sixty-one acres of land sold under the decree of said court in the cause of Bassel Lucas against the plaintiff Sturm and others, after satisfying the decree in favor of said Lucas and others in said last named cause, together with any other matters that said commissioner may deem pertinent or

that may be required by the parties hereto. Said commissioner may give notice of the time and place of executing this order by publishing for four successive weeks in the Clarksburg "News," a newspaper published in this county, and the same shall be equivalent to personal service of notice upon the parties hereto."

From this decree the defendant, John Chaltant, obtained the present appeal.

The cause has been submitted to this Court on the brief of counsel for the appellee, Sturm, no argument having been made or brief filed for the appellant.

The errors assigned by the appellant in his petition for the appeal are as follows:

"First. The court erred in refusing to allow the said supplemental answer to be filed.

"Second. The court erred in rendering a decree for a writ of possession against your petitioner as aforesaid.

Third. "The court erred in not dismissing the plaintiff's bill under the pleadings and proofs in the cause.

"Fourth. The court having ordered the said writ of possession, if that was not erroneous, then the court erred in making any other order or any order of reference in said cause.

"Fifth. The court erred in directing any order of reference in said cause under the pleadings and proofs.

"Sixth. The court erred in making any order of reference in respect to a tract of sixty-one acres of land, as no such tract was involved under the pleadings and proofs in this cause."

The second and third of these assignments are fully answered and disposed of by the opinion and mandate of this Court on the former appeal as plainly appears from the following portion of said opinion:

"And this Court proceeding to render such decree as the said circuit court should have rendered, it is ordered that the defendant's demurrer to the plaintiff's bill * * * be and the same is hereby overruled with leave to the defendants to answer the same; and this cause is remanded to said circuit court with directions to said court, that it shall give to the defendants such reasonable time as it may deem proper to answer the plaintiff's bill, and upon their failure to answer,

or if, upon such answer, the material facts alleged in said bill are established by proof or the admission of the defendants, then to set aside the decrees and declare void as to the plaintiff the judgments therein mentioned, set aside and annul the sales of the plaintiff's property made under said void judgments and decrees and restore him to the possession thereof," &c.—22 W. Va. 417, 418.

All the material allegations of the plaintiff's bill having been established by proof, as before stated, and in fact not denied by the defendants, so as to put the plaintiff to the proof of them, (*Warren* v. *Syme*, 7 W. Va. 474; *Simpson* v. *Edmiston*, 23 *Id.* 675, 681,) the circuit court was bound by the above quoted mandate and direction of this Court to sustain the plaintiff's bill and award him a writ of possession so that he might be restored to the possession of his lands. It requires no argument or re-statement of the decision made in this cause on the former appeal, to show that the circuit court did not err in respect to the matters alleged in said second and third assignments of errors. It would have been plain error, had it done otherwise.

The appellant's fourth, fifth and sixth assignments of error have reference exclusively to that part of the decree referring the cause to a commissioner for a report upon certain matters therein specified and which appear in the extract from the decree hereinbefore quoted in full. The facts alleged in the plaintiff's bill and the nature of the controversy show clearly that an order of reference such as the one made was entirely proper. And this being so, this Court will not anticipate the action of the commissioner and the circuit court in regard to the matters thus referred for enquiry. Any appeal as to those matters is premature, and the Court can not consider them until they have been acted upon by the circuit court. *Laidley* v. *Kline*, 21 W. Va. 21. And moreover, it does not appear, that the appellant has any interest in, or that he could be prejudiced by, the enquiries directed to be made by said order of reference, and, therefore, the appeal by him from that part of the decree may, so far as the record now discloses, have been improvidently awarded. *Reid* v. *Stuart*, 13 W. Va. 338, 354. But, if it is sought, under the general direction contained in said order, to take an account of rents

and profits of the said thirty acres and two acres and sixteen poles of land during the time they have been in the possession of the appellant, the propriety of the order would still be unquestionable, as such a reference, in similar causes, was expressly made and sustained by this Court in *Haymond* v. *Camden*, 22 W. Va. 182, 207, and *Cain* v. *Cox*, 23 *Id.* 594, 616.

The only remaining assignment of error is the first, which alleges that: "The court erred in refusing to allow said supplemental answer to be filed." It would seem to be a sufficient answer to this assignment to refer to the form and character of said answer, and the absence of any explanation for the delay in tendering it. *Mathews* v. *Dunbar*, 3 W. Va. 138; *Tracewell* v. *Boggs*, 14 *Id.* 254; *Bowen* v. *Cross*, 4 Johns. ch. 375; *Stout* v. *Shew*, 42 Am. Dec. 570; Story's Eq. Pl., sec. 901. But waiving all this, I am clearly of opinion that the facts alleged in said answer are immaterial, and that it was properly rejected for that cause.

Both the pleadings and the proofs show that the appellant held and claimed said lands under and by virtue of the sale made by Commissioners Despard and Maxwell, and that said commissioners professed to sell only the title of the appellee, Sturm, in pursuance of a decree entered to sell the lands of said appellee. It is plain, therefore, that the appellant never held or claimed said land under any title or color of title adverse or in hostility to the title of the appellee, but that he claimed under the title of appellee and in privity with him. The appellant, according to his pretension and claim, was the successor of the appellee to the title, and that the relation between him and the appellee was that of vendee to vendor. In such cases all the decisions agree that the payment of the taxes by one party, either by the vendee or the vendor, will be "a full satisfaction of the taxes legally chargeable upon the land, and the State could have no further charge for taxes against the land under the title thus held in privity and successively by the vendor and vendee." *Simpson* v. *Edmiston*, 23 W. Va. 675, 683; *Witham* v. *Sayers*, 9 *Id.* 671; *Bradley* v. *Ewart*, 18 *Id.* 598; *Lohrs* v. *Miller*, 12 Grat. 452.

This case is essentially different from that of *Simpson* v. *Edmiston*, 23 W. Va. 675. That was a case arising out of a sale of land for delinquent taxes made by a sheriff without

any judicial sanction. The question in that case was not whether the sale itself was valid or invalid, but the assumpsion was that the sale itself was valid, and the controversy related solely to the question, whether or not the deed made by the clerk transferred the legal title of the land sold to the purchaser at the tax-sale; and the court held that by reason of defects *apparent upon the records* of the proceedings under which the deed was made, the deed was null and void as a conveyance, but operated as a color of title upon which the holder thereunder might base a claim adverse or in hostility to, but not in privity with, the former owner. The clerk having a mere ministerial duty to perform and no authority to convey except in the manner and form prescribed by the statute, and the statute not having been pursued, the deed could have no other effect than if it had been made by a person having no pretense of authority or right to do so. The want of authority to make the deed in that case was by the court held to be *apparent upon the face of the deed* and, therefore, gave notice to the owner of the land, as well as all other persons, that it was absolutely void. Under these facts and circumstances the court, according to its interpretation of the third section of article thirteen of our Constitution, held, that the owner, having such notice of the nullity of the tax-deed, it was his duty to continue the land on the assessor's book in his own name and pay the taxes thereon, and that the payment of the taxes by such adverse claimant in his own name would not protect from forfeiture the title of the owner.

In the case at bar the facts are very different. Here the sale was made by a court in a judicial proceeding—a proceeding which, it is true, was subsequently held to be absolutely void, but one which the courts at that time and for a long time subsequent held to be valid and binding upon the parties It professed to transfer the whole interest and title of the appellee in the lands to the appellant and to place the latter as to the title and ownership of the lands in the precise position occupied by the former before the sale. If the appellee had after the sale attempted to interfere with the land or dispute the appellants title thereto, by repudiating the authority of the court which made the sale, he would

have subjected himself to punishment by the court. It would not have availed him to deny the authority of the court and assert that the sale was void. The court had the power to compel obedience and the appellee had no option but to submit and obey its orders and decrees. Such was not the case in relation to the act of the clerk, a mere ministerial officer, in making the tax-deed, before referred to, and which disclosed its invalidity on the face of the record. The owner in that case might with impunity disregard such void deed and, if he still claimed the land, it was his duty to do so and continue the land on the assessor's books and pay the taxes. The two cases are essentially different and the principles and reasons controlling the decision of the one have no application to the other.

The case at bar is strictly analogous to that of *Lynch* v. *Andrews*, 25 W. Va. 751, in which this Court held, that the payment of the taxes on land by a purchaser thereof at a judicial sale, which is subsequently declared void, will inure to the benefit of the owner and the State can have no claim against the owner for taxes on the land during the same time and no forfeiture of the land will occur.

I am, therefore, of opinion that the court did not err in rejecting the supplemental answer tendered by the appellant. It may be proper, however, to say, that if the appellee, Sturm, asserts a claim against the appellant for rents and profits of the lands, the latter will be entitled to a credit on such rents and profits for all lawful taxes paid by him. *Haymond* v. *Camden* and *Cain* v. *Cox*, *supra*.

It is suggested by the counsel for appellee, that the decree appealed from should be corrected so as to make it, in express terms, declare void the deed from the commissioners to the appellant for the thirty acres and two acres and sixteen poles therein mentioned. I do not think this necessary, as such is the necessary effect of the decree. It adjudges and declares void and sets aside as to the plaintiff, the appellee Sturm, the sales of said lands, and the decrees ordering and confirming the sales and directs that the appellee be restored to the possession of the lands. It seems to me, that this as effectually destroys and annuls all the force and effect of said deed as if it had in terms been cancelled. If, however, it

shall hereafter for any reason, appear necessary to do so, the circuit court may declare said deed void and cancel it.

I am of opinion, for the reasons stated, that the decree of the circuit court should be affirmed.

AFFIRMED.

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WHEELING.

HERRON, *et als. v.* CARSON, *et als.*

Submitted June 4, 1885.—Decided June 27, 1885.

1. A subsequent statute revising the whole subject-matter of a former one and evidently intended as a substitute for it, though it contains no express words to that effect, must on principles of law as well as in reason and common sense operate a repeal of the former law. (p 75.)

2. The thirty-eighth section of chapter one hundred and ninety-four of Acts of 1872-3, directing county courts in certain cases to award writs of *ad quod damnum* returnable to such county courts is repealed by the thirty eighth section of chapter fourteen of Acts of 1881, which provides that the county courts in such cases shall institute and prosecute in their names in the circuit court proceedings to ascertain the just compensation to be paid to the tenants and proprietors of lands taken for a public road. (p. 77.)

3. A county court may appoint all three of the individuals composing the court a committee to view and report upon a county-road proposed to be established. (p. 79.)

4. Though it would be more formal for such committee to return their report in writing, signed by each of the members of such committee, yet if on the return of the report of the committee it is not thus reduced to writing and signed by each member, but in lieu thereof the whole of their report containing all the details required by the statute-law is set out at length on the order-book of the county court in the form of a recital in an order of the court made on such report, this will suffice, and the court may proceed to establish the road, just as it could have done, had such more formal report signed by all the members of the committee been returned to the court. (p. 80.)

GREEN, JUDGE, furnishes the following statement of the case:

On June 6, 1881, William Herron and twelve others of Hancock county, West Virginia, presented their petition to the county court of said county, asking that court to appoint viewers "for the purpose of viewing and reporting a public road to connect the Florance and Frankfort roads, through the lands of Lucinda Carson, William Herron and Alexander Cunningham, in precinct No. 3, Clay district, in said county." This petition states, "that this road has been a traveled road open to the public for more than forty years, but it never had by any order been declared to be a public road." At the same time Thomas Peterson and twenty others filed another petition for the opening of another and rival road in said county. On the presentation of these petitions the county court of Hancock by consent of parties made an order, whereby the President of the court and the other two members of it were appointed a committee to view the proposed roads, and to that end they were ordered to meet on the proposed road on August 22, 1881, at 10 o'clock A. M.

On August 23, 1881, the said court made an order in the case, from which it appears by way of recital that said commissioners as such committee did on August 22, 1881, view said proposed roads and other routes and had them surveyed and plats made of them, returned to the court and filed; and from all the evidence adduced, they, the committee, decided in favor of a specified route marked on the plat, which would appear to be substantially the road petitioned for by Herron and twelve others; and that they reported that it would not be necessary to take any yard, garden, orchard, or part thereof, or to injure or destroy any building, and that this road had already been open to the public and traveled for nearly forty years. This order after these recitals states, that all the parties, through whose lands this proposed road passes were present then in court, and it then proceeds thus: "None of these parties having as yet claimed or waived damages in the event of the establishment of this road as a public road, and the court having decided to undertake said work on behalf of the county and to establish this road,

the same to be twenty feet wide," (describing it by metes and bounds); and it concludes thus: "It is therefore ordered that the said road upon the said route as hereinbefore entered, be established as a public road, and the surveyor of precinct No. 3, Clay district, be directed to take the same under his control."

This order was subsequently, on December 5, 1881, set aside as defectively and improvidently made; and in lieu thereof this order was then made with recitations similar to those of the order of August 23, 1881, set aside, except that they were somewhat more general and failed to state, as the former order did, that the committee reported, that it would not be necessary to take any yard, garden, orchard, or any part thereof, or injure or destroy any building, and which then directed: "That December 17, 1881, be fixed for hearing the parties interested at a special meeting of the court to be held on that day, and that for that purpose William Herron, Andrew Carson and wife, and Alexander Cunningham be summoned to show cause against the establishment of this road and what damages, if any, they may be entitled to recover." On that day, December 17, 1881, the order made shows, that all persons, through whose lands the proposed road passed, appeared and waived all damages, except Lucinda Carson and Andrew Carson, who appeared and filed an answer in writing denying the jurisdiction of the court; and thereupon it was "ordered that proceedings be instituted and prosecuted by the court in its own corporate name, in the circuit court of Hancock county pursuant to law to ascertain, what will be a just compensation to said Lucinda Carson for the land proposed to be taken and any and all other damages she may be entitled to."

An appeal was taken from these proceedings of the county court of Hancock by Andrew Carson and Lucinda his wife, and Lucinda having died, it was revived in the names of her children and heirs-at-law, the Swearingens, and having been heard by the circuit court on March 3, 1882, that court reversed the proceedings of the county court because of the error of that court in its failure to appoint a day for a hearing and to cause notice to be given to the proprietors of the property to be taken or injured to show cause against the same and for other errors; and it ordered that said matters be remanded

to the said county court with directions to appoint a day for hearing and to cause notice to be given to the proprietors of the property to be taken or injured to show cause, if any they have, against the establishment of the proposed road; a judgment was rendered in favor of the appellants for the costs.

On the return of the case to the county court of Hancock, after the proprietors of the land, through which the proposed road passed, were summoned to show cause, why the proposed road should not be established, the former appellants moved the court to recommit the case to other viewers, which the court refused to do, and they took a bill of exceptions. They then asked the court to award them a writ of *ad quod damnum*, which the court refused to do, and they took a bill of exceptions. This order of the county court made May 8, 1882, thus concludes: "And it further appearing to the court, that the said parties-defendant claim damages amounting to $500.00, and the court being willing to give only $25.00 and water-privilege, which offer the defendants refuse to accept, it is hereby ordered, that proceedings be instituted and prosecuted in the circuit court of Hancock county in the name of the county court of Hancock county pursuant to law, to ascertain what will be a just compensation to the aforesaid proprietors or tenants, if any, for the land proposed to be taken." The circuit court refused to entertain these proceedings, because the county court had made no order to establish the road, and dismissed the petition of the county court therefor. The county court then, on December 5, 1882, made an order, that the road prayed for in the petition of William Herron and others be established as a public road, and that proceedings be instituted in the circuit court of Hancock county to ascertain what will be a just compensation to the owners of the land, through which said road is to pass, for the land necessarily taken, and all other damages said land owners will sustain by reason of the establishment of this road. Thereupon the following proceedings were had in the circuit court of Hancock county: On March 28, 1883, an order was entered in said court, which set out, that the county court of Hancock county had filed its petition, which had ordered the establishment of this public road, and that Andrew Carson, Mary Elizabeth Swearingen, and John Swear-

ingen, her husband, Nancy Ann Swearingen, and John Swearingen, her husband, through whose lands this road passed, claimed compensation therefor; and the county court of Hancock therefore prayed, that commissioners might be appointed to ascertain a just compensation to these land-owners for their lands proposed to be taken. These commissioners the court appointed in the manner prescribed by law to ascertain what would be a just compensation for so much of the real estate, as is proposed to be taken, as well as for damages to the residue of said real estate, beyond the peculiar benefits which will be derived in respect to such residue. Their report was excepted to by these land-owners, who demanded a jury of twelve freeholders to ascertain their damages. After the jury was sworn, they were by the consent of parties and by leave of the court allowed in the custody of the sheriff to go upon the land proposed to be taken and viewed the same and returned into court, and having retired to their room they found a verdict that $76.00 would be a just compensation for so much of the said real estate, as was proposed to be taken, describing it, as well as for the damages to the remainder of said real estate beyond the peculiar benefits, which will be derived in respect to such residue from the work to be constructed.

The court upon this verdict on August 25, 1883, rendered judgment in favor of the defendants, Andrew Carson, Nancy Ann Swearingen and John Swearingen, her husband, Mary E. Swearingen and Andrew Swearingen, her husband, against the county court of Hancock county, the petitioners, for their costs and also for the sum of $76.00, the damages so ascertained by the jury; and upon the payment thereof and of the costs by the county court of Hancock, the petitioners, said county court was to be entitled to the right of way through the real estate proposed to be taken as aforesaid. On September 3, 1883, the county court of Hancock county made an order refusing to abandon this undertaking on the motion of these land-owners and adjudging the payments to them of said costs and damages; and upon the payment thereof the proper road-surveyor was ordered to take charge of said public road and open the same for public travel. But this was suspended for forty-five days to afford the de-

fendants an opportunity to appeal from this order to the circuit court. This appeal to the circuit court of Hancock county was granted by the judge of that court November 25, 1883. On June 25, 1884, the circuit court decided: "That there was no error in the orders and proceedings had by said county court made since the former appeal from the said county court and including the final order of the county court of Hancock made September 3, 1883, complained of by the appellants; and it therefore affirmed the order made December 5, 1882, and all the orders subsequent thereto and adjudged, that the county court of Hancock recover of the appellants their costs about this appeal expended. This order of the circuit court was suspended for sixty days on the appellants giving bond with good security before the clerk of said court in the penalty of $100.00 conditioned as required by law, that the appellants might apply for a writ of error to said judgment of the circuit court. To this order of the circuit court of June 25, 1884, a writ of error has been awarded on the petition of John Swearingen and Nancy Swearingen, his wife, and Andrew Swearingen and Mary E. Swearingen, his wife.

J. R. Donehoo for plaintiffs in error.

G. W. Caldwell for defendants in error.

GREEN, JUDGE:

For a proper understanding of the legal questions involved in the record in this case it is necessary to give a brief history of the statute-law in Virginia and this State in reference to the establishment of public roads. By chapter two hundred and thirty-six of the Revised Code of 1819, vol. 2, p. 233, it was provided, that, when any persons shall apply to the county court to have a new public road opened, the court shall appoint three viewers, who being sworn should view the ground and report the conveniences and inconveniences, which would result to individuals and to the public, if the public road should be opened. On the return of the report, if the county court was of opinion, that the road should be opened, it was required to summon the proprietors and tenants of the land, through which the proposed road would pass

or their agents and then issue a writ in the nature of a writ of *ad quod dammum* summoning a jury of twelve freeholders to meet on the ground on a certain day, of which the proprietors their tenants or agents were to be notified, unless they were present in court, when the order was made. This jury by an inquest under their hands and seals ascertained, what damages each of the proprietors and tenants would sustain by the opening of this public road. Upon the return of this writ and inquest to the county court it determined, whether the public road should or should not be opened, adjudging costs against the applicants, if the road was not opened. If it was determined that this public road should be opened, then it was made the duty of the court to levy on their county at its next levy to be laid the damages so found and the costs of the inquest and direct them to be paid to those respectively entitled thereto.

This act was amended atterwards particularly by the act passed February 15, 1833, (Acts 1832–4, p. 54) and by the act passed January 30, 1834, (Acts of 1833–4, p. 97.) On March 3, 1835, an entirely new law was passed providing for opening and repairing public roads (Acts of 1834–5 p. 56;) and this act was amended by an act passed March 30, 1837, (Acts of 1836–7 p. 80) and further by an act passed March 31, 1838, (Acts of 1838 p. 90.) I do not deem it necessary to state the contents of these several acts. It will suffice to state the provisions of chapter fifty-two of the Code of Virginia, p. 266, showing the change which had been made. By section six of this chapter it is provided, that when any person applied to a county court to have a public road established, the court should direct one or more of its commissioners of roads (if it had any such officers), or it might appoint three or more viewers, to view the ground and report to the court the conveniences and inconveniences, which would result as well to individuals as to the public, if such road was established, and especially whether any yard, garden, orchard or any part thereof would have to be taken. The seventh section specifies the details to be set out in this report. By section eight it was provided, that upon this report being made, unless the court should be against establishing the road, the proprietors and tenants of the land should be sum-

moned to show cause why the road should not be established. Upon the return of such summons, if the county court had enough before it to enable it to fix upon a just compensation to the proprietors and tenants, and it did so, and they were willing to accept the same, the county court might establish the road without issuing a writ of *ad quod damnum*. Otherwise this writ was to be issued. This writ was executed very much in the manner, in which it was directed to be executed under the provisions of the Code of 1819 stated above. Upon the return of this writ and inquest the county court upon the report, inquest and other evidence, if any, determined, whether this public road should be established. See § 13, p. 268. This was necessarily changed when by the formation of this State it was provided by Article VII, § 4 of our constitution, (Code of West Virginia, p. 32) that the board of supervisors of each county shall have under their jurisdiction the establishment of public roads in the county. The abolition of the county court by this constitution necessarily required a change in the law with reference to the establishment of public roads.

Under the different constitutions of Virginia prior to that time the county courts had not only existed, but they possessed very extensive powers administering the internal public affairs of the counties, regulating roads, ferries and mills, and exercising jurisdiction in all probate matters. But they also had very extensive jurisdiction in the trial not only of civil and criminal matters but also a very large jurisdiction in the trial of chancery causes. In fact they always had had more extensive original jurisdiction than any court in Virginia. When this State was formed, by its first constitution a very small portion of this extensive jurisdiction of the county courts was transferred to the boards of supervisors and the recorders then first called into existence. They were authorized to administer the internal and police affairs of their counties and had under their control the establishment and regulation of roads, public landings, ferries and mills. But they had no jurisdiction to try any civil or criminal action, nor had they any chancery jurisdiction. In fact the board of supervisors under our first constitution hardly reached the dignity of a court, though some powers conferred on them were semi-judicial. By this first constitution (Code, p. 32)

it was expressly provided, though the power to establish and regulate roads was conferred on the boards of supervisors, and though the issuing of writs of *ad quod damnum* had always been an incident to the establishment of public roads, "that all writs of *ad quod damnum* should be issued from the circuit court."

The legislature of this State at its first session after the adoption of our first constitution passed on December 4, 1863, "an act providing for the construction and repairs of roads and bridges," (chapter 120 of Acts of 1863 p. 178.) One of the provisions inserted in this law rendered necessary by our constitution was contained in the ninth section ot said chapter one hundred and twenty. It was thereby provided, that, if the board of supervisors and any proprietor did not agree as to what was a just compensation, "a writ of *ad quod damnum* should be awarded, it desired by any proprietor or tenant, or if the board of supervisor should see cause to apply for the same. Such writ should be awarded by the circuit court commanding the sheriff to summon and impanel a jury of twelve freeholders of the county not related to either party to meet on the lands of such proprietors and tenants, as may be named in the writ, at a certain place and day also therein specified, of which notice should be given by the sheriff to such proprietors and tenants;" and by the twelfth section of this act it was provided, "that, when this jury had agreed upon its verdict or inquest, it should be signed by the jurors and returned by the sheriff together with the writ to the circuit court, which should, if satisfied it was in conformity with the law, return the same to the board of supervisors, who should determine, whether the road should be established as proposed." Some slight changes were made in this law, and it finally took the form, in which it appears in the Code of West Virginia, chapter forty-three. It provided, that the petition for the establishment of a public road instead of being addressed to the county court was to be addressed to the board of supervisors, who were thereupon required to appoint two or more viewers or a committee of their own body to view the ground and make such report, as had been previously required. See ch. 43 of Code of W. Va. § 35, p. 274. And the board of supervisors were thereupon,

if they did not then decide against establishing the road, to appoint a day for hearing the parties and have them summoned to appear then and show cause against establishing the same. (Code, ch. 43, § 36, p. 275.) The board of supervisors could then or at any time afterwards determine, what would be a just compensation to each of these tenants and proprietors, and if they were severally willing to accept the amount so fixed and so stated in writing, the board could thereupon determine to open such public road; but if they or any of them did not so accept the compensation paid by the board of supervisors, and it decided in favor of opening this road, the board was required to "order proceedings to be instituted and prosecuted in their corporate name before the circuit court of the county to ascertain, what will be a just compensation to such proprietor or tenant in the premises, and to lay a sufficient levy for that purpose. After the compensation was so ascertained, it was left optional with the board of supervisors to pay the same or to abandon the proposed undertaking. (Code, ch. 43, § 38, p. 275.) This mode of proceeding was obviously a substitute for the former mode of determining the amount of compensation by awarding to any tenant or proprietor a writ of *ad quod damnum*, which was formerly under the constitution and laws of Virginia executed and returned to the county court and afterwards to the circuit court, as before stated.

But by our constitution of 1872 the board of supervisors was abolished; and county courts were again established with jurisdiction and powers resembling those, which county courts had under the constitution and laws of Virginia prior to the formation of this State. By Article VIII, section 27 (See Acts of 1872-3 p. 30) there was conferred upon these courts jurisdiction among other things "in all actions at law, when the amount in controversy exceeds $20.00; in all cases of *habeas corpus*, *mandamus*, *prohibition*, *certiorari* and in all suits in equity. And by section 28 of Article VIII (p. 30) they had among other things "the superintendence and administration of the internal police and fiscal affairs of the county, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills with authority to levy and disburse the county levies." An examination of

this article will show, that the county courts under this constitution as originally adopted had not only all the powers, which had formally been exercised by the board of supervisors, but very extensive judicial powers of every description, common law and equity, civil and criminal, the model for these county courts being the county courts, which had existed under the constitution and laws of Virginia at all times prior to the formation of the State of West Virginia, and to which therefore the people of this State had formerly been long accustomed.

The adoption of this constitution of course required a change in the manner of establishing public roads. The new road-law is contained in chapter one hundred and ninety-four of Acts of 1872–3, passed December 22, 1872, and the mode of establishing public county roads was set out in section 29 *et seq.*, p. 572. The mode adopted was in most respects similar to that adopted in chapter 52 of the Code of Virginia of 1849, section 6 *et seq.*, p. 267, &c., modified by the adoption of some of the provisions of chapter 43, section 35 *et seq.*, of Code of West Virginia p. 274, &c. But no provision was made for having the proposed road viewed in any case by a commissioner of the county as provided in the Code of Virginia of 1849. But the view was to be made "by two or more viewers or a committee of their own body." Section 35 of chapter 194 of Acts of 1872–3, p. 572, adopting in this respect the provisions of chapter 43 of Code of West Virginia, section 35 p. 274. The viewers being appointed by the county court instead of the board of supervisors or the committee being a committee appointed by the county court or being a committee of the body of the county court instead of the body of the board of supervisors. On the other hand when there was no agreement between the court and any tenant or proprietor as to the compensation to which he was entitled, if the road was to be established, this act of 1872–3 provided that the county court should at the insistance of such proprietor or tenant award a writ of *ad quod damnum* returnable to the county court to ascertain the just compensation of such tenant or proprietor, and after its return the county court upon the report, the inquest of the jury and other evidence should decide, whether the road should be established.

(Chapter 194, section 38 *et seq.* of Acts of 1872–3.) These provisions are substantially similar to those contained in chapter 52 of Code of Virginia of 1849 section 10 *et seq.*

But on the second Tuesday in October, 1880, an amendment was adopted to the Constitution of West Virginia (Acts of 1883, p. 189,) which, while it did not abolish the county courts, stript them of almost all powers excepting only those, which under the first Constitution of West Virginia had been conferred on the board of supervisors and upon the recorder. This very limited jurisdiction is thus defined in the first amendment (Article XIII., section 24, page 194 of Acts of 1883): "They shall have jurisdiction in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, curators, and the settlement of their accounts, and in all matters relating to apprentices. They shall also, under such regulations as may be prescribed by law, have the superintendance and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to levy and disburse the county levies." These several powers were by the first Constitution of West Virginia conferred on the board of supervisors, (Article XII., section 4), or on the recorder. (Article VII., section 6 of Code, pages 32, 33.) There was however one diversity, to which I would call attention. The fourth section of Article VII. of the first Constitution (Code, p. 32) provided expressly that "all writs of *ad quad damnum* shall issue from the circuit court." In the amendment to the Constitution of 1880, nothing is said about writs of *ad quod damnum.* It is silent as to the court from which they shall issue. But after setting out these semi-judicial duties, which under the first constitution had been performed by the board of supervisors and by the recorder, and conferring jurisdiction with reference to them on the county courts, it adds: "Such courts may exercise such other duties *not of a judicial nature* as may be prescribed by law. (Acts of 1883, p. 195.) After the passage of this amendment of the Constitution in 1880, the next Legislature on March 12, 1881, passed an act concerning roads, bridges and landings, reviving, amending and re-enacting chapter forty-

three of the Code; and by it the proceedings for the establishment of public roads were the same as those provided in the Code, except that the tribunal, before whom these proceedings were had, and which was authorized to establish public roads, was in accordance with the amendment of 1880, the county court instead of the board of supervisors. With this exception the mode of proceeding was almost identical with that prescribed by chapter forty-three of the Code. This act in chapter fourteen of the Acts of 1881, p. 152. (See especially section 35, *et seq.*, p. 162, &c., and section 38, p 163.) Instead of directing the awarding of a writ of *ad quod damnum*, where the county court and the proprietors might not agree as to what was a just compensation, it provided: "That the county court should order proceedings to be instituted and prosecuted in its corporate name in the circuit court of the county pursuant to the forty-second chapter of the Code, to ascertain what will be a just compensation to such proprietor or tenant for the land proposed to be taken; but that when such compensation shall be so ascertained, it shall be at the option of the county court to pay the same, or to abandon the proposed undertaking; and if it decide to pay the same, it shall lay a sufficient levy for the purpose as provided for in chapter thirty-nine of the Code." This provision is identical with the first part of section thirty-eight of chapter forty-three of the Code, except that the county court is now substituted for the board of supervisors.

The last section of this chapter fourteen of Acts of 1881 is as follows: "All acts and parts of acts coming within the purview of this chapter and inconsistent therewith are hereby repealed, except the act passed December 20, 1873, entitled 'an act providing an alternative method of constructing and keeping in repair county roads,' an act amendatory and in aid thereof, shall not in any wise be affected by this act." Acts of 1881, p. 167. Did this chapter fourteen of Acts of 1881 operate a repeal of section thirty-eight *et seq.* of chapter one hundred and ninety-four of Acts of 1872–3, which provided that where "the compensation to be paid to any proprietor or tenant is not fixed by an agreement, the county court shall award a writ of *ad quod damnum* if desired by any proprietor or tenant," and directing the mode of proceeding un-

der this writ and the action of the county court upon its return to the court with the inquest of the jury of twelve freeholders? It is insisted by the counsel for the defendants in error, that it did, and by the counsel for the plaintiff in error, that it did not.

Upon the hearing of this case by the county court on June 5, 1882, the defendants by their counsel moved the court to award a writ *ad quod damnum* to issue from the county court returnable to it pursuant to this thirty-eighth section of chapter one hundred and ninety-four of Acts of 1872–3. The court overruled the motion and refused to award the writ ordering in lieu thereof, that proceedings should be instituted and prosecuted in the name of the county court of Hancock in the circuit court of said county to ascertain, what would be a just compensation to these tenants and proprietors pursuant to the thirty-eighth section of chapter fourteen of Acts of 1881. The county court obviously regarding this chapter fourteen of Acts of 1881 as repealing chapter one hundred and ninety-four of Acts of 1872–3, or at least as repealing the thirty-eighth section of this act, which directed the county court to award said writ of *ad quod damnum*. Did the county court err in this conclusion?

It is true, that a statute general in its terms and without negative words will not be construed to repeal by implication the particular provisions of a former statute, which are special in their application to a particular case or class of cases, unless their repugnancy be so glaring and irreconcilable as to indicate the legislative intent to repeal. (*Railroad Co.* v. *Hoard*, 16 W. Va. 270;) and a construction of a statute, which repeals former statutes or laws by implication and changes long approved remedies, is not favored by the courts. (*Farqueran* v. *Donnally*, 7 W. Va. 115, syl. 8.) But a subsequent statute, revising the whole subject-matter of a former one and evidently intended as a substitute for it, though it contains no express words to that effect, must on principles of law as well as in reason and common-sense operate to repeal the former. This was held in *Trustees of Philip's Academy* v. *King, Executor*, 12 Mass. 545. Following this principle the court in the case of *King* v. *Carter*, 4 Burr. 2026 decided, that a former statute which inflicted a penalty

of £100 and three months imprisonment on persons enticing away artificers, was virtually repealed by a subsequent statute inflicting £500 penalty and twelve months imprisonment for the same offence. The same principle was acted on in *The King* v. *Davis*, 1 Leache Cr. L. 306.

So in *Nichols* v. *Squire*, 22 Mass. 168, (5 Pick.) it was decided, that the statute of 1785, chapter twenty-four respecting lotteries was repealed by statute of 1817, chapter one hundred and ninety-one, as the latter covered the whole subject-matter of the former statute. By the statute of 1817 the selling of tickets in any lottery not granted or permitted by the Commonwealth was prohibited under severe penalty; and when the legislature imposes a second penalty for an offence, whether that penalty is smaller or larger than the former one, a party can not be allowed to recover one or the other at his option.

The same principle was acted on by the Supreme Court of the United States in *Morris* v. *Crocker et al.*, 13 How. 210, (54 U. S. 429), where it was held, that the fourth section of the act of Congress of February 12, 1793, entitled "An act respecting fugitives escaping from justice and persons escaping from the service of their masters," is repealed, so far as relates to the penalty, by act of Congress of September 18, 1850, entitled "An act to amend and supplementary to the above act." This conclusion is based on this ground, to use the language of the court: "The recent statute covers every offence found in the former act, which subjects the offender to a penalty of $500.00 and prescribes a new and different penalty recoverable by indictment." The principles deducible from the Massachusetts cases and followed in these old English cases and acted upon in this case by the Supreme Court of the United States, it seems to me, must govern in determining the question which I am now discussing, rather than the principles laid down in the West Virginia cases above cited, which seem to me, to be inapplicable to the question under consideration. The principle, which, it seems to me, must govern in determining the question I am considering, is expressed in the case of the *Trustees of Philips' Academy* v. *King, Executor*, quoted above. This seems to me obvious, when we bear in mind, that chapter forty-three of

the Code of 1868 covered the whole subject-matter, it being the only law then in force; and chapter fourteen of the Acts of 1881 simply revised, amended and re-enacted it slightly changing certain sections when necessary to do so by reason of the amendment to our constitution of 1880. And as chapter forty-three covered the whole subject, of course chapter fourteen of the Acts of 1881 likewise covered the whole subject. Now as chapter one hundred and ninety-four of the Acts of 1872–3 also covered the whole matter and was upon its enactment the entire law in force with reference thereto, it being a substitute for chapter forty-three of the Code, which had become obsolete by reason of the abolition of the board of supervisors and the creation of the county court, it must therefore follow, that chapter fourteen of the Acts of 1881 must have been intended by the legislature as a substitute for chapter one hundred and ninety-four of Acts of 1872–3, although this last act does not say so expressly, and therefore upon the principles of law, which I have laid down, and which are recognized in the cases above cited as well as in reason and common-sense, chapter fourteen of the Acts of 1881 must operate a repeal of chapter one hundred and ninety-four of Acts of 1872–3 and especially must section thirty-eight of said chapter fourteen substantially the same as what was section thirty-eight of chapter forty-three of the Code of 1868, operate a repeal of section thirty-eight of chapter one hundred and ninety-four of Acts of 1872-3. This section thirty-eight of chapter fourteen of Acts of 1881 provides:

"If the compensation to be paid to any tenant or proprietor be not fixed by agreement the county court shall order proceedings to be instituted and prosecuted in the circuit court of the county pursuant to the forty-second chapter of the Code of West Virginia to ascertain what will be a just compensation to such proprietor or tenant for the lands proposed to be taken."

This for the reasons, which I have stated, was evidently intended as a substitute for the thirty-eighth section of chapter one hundred and ninety-four of Acts of 1872–3, which provides, that, if the compensation to be paid to any proprietor or tenant be not fixed by agreement, the county

court should award a writ of *ad quod damnum*, if demanded by any proprietor or tenant, or if the court see cause for awarding the same. These proceedings in the circuit court under chapter forty-two of the Code thus substituted for the writ of *ad quod damnum* to be issued by the county court by chapter fourteen of Acts of 1881 were, when this substitution was made, March 12, 1881, substantially the same in its mode of ascertaining the compensation of the proprietors, as that which had existed in Virginia and in this State up to the passage of our Code of 1868. In other words it was substantially the same, as that which existed, when a writ of *ad quod damnum* was issued. It is true, that these proceedings under chapter forty-two of the Code had, when the Code was enacted, been materially different from the proceedings under a writ of *ad quod damnum*. But only seventeen days before the passage of chapter fourteen of Acts of 1881, chapter forty-two of the Code, under which these substituted proceedings in the circuit court were to be had in lieu of the writ of *ad quod damnum*, had been amended by what is called by some blunder chapter eighteen of Acts of 1881, the act having been passed seventeen days before the act called chapter fourteen. This chapter eighteen of Acts of 1881 provides by its seventeenth section:

"Either party may demand, that the question of compensation to be paid shall be ascertained by a jury of twelve freeholders selected and empaneled for the purpose."

This provision was not originally in chapter forty-two of the Code. It became necessary to insert it because section nine of Article III. of the Constitution of 1872 provided "that when required by either of the parties such compensation shall be ascertained by an impartial jury of twelve freeholders." After section seventeen of Acts of 1842 was thus amended by chapter eighteen of Acts of 1881, the mode of instituting proceedings in the circuit court according to chapter forty-two of the Code became substantially the same as by the writ of *ad quod damnum*. And hence the conclusion I have reached, that these proceedings in the circuit court were intended as a substitute for the writ of *ad quod damnum* in the county court, is made still more certain; for the Legislature would hardly have intended, that two

modes of ascertaining this just compensation should exist at the same time, when they were substantially the same, the one being by a jury of twelve freeholders in the circuit court, and the other by a jury of twelve freeholders in the county court. And it is rendered still more improbable that this could have been the Legislative intent, when it is, to say the least, very doubtful whether under our Constitution as amended a writ of *ad quod damnum* could be issued by the county court, or a jury of twelve freeholders sit in that court.

There is therefore no weight in the argument of the counsel for the plaintiff in error, that as the writ of *ad quod damnum* was an ancient common law remedy, which had long been used, it ought not to be supposed to be abolished by chapter fourteen of Acts of 1881, unless its abolition was expressly declared; for what is substantially the same has been substituted for it. The county court therefore did not err in refusing to award a writ of *ad quod damnum* to the plaintiffs in error, and in ordering proceedings to be instituted and prosecuted in its name in the circuit court of Hancock county. These proceedings in the circuit court were regular and proper. The tenants having excepted to the report of the commissioners were allowed a jury of twelve freeholders according to law, who returned their verdict; and a judgment was rendered pursuant to this verdict, and on its return to the county court of Hancock that court established the road and made the proper order for the payment of the damages and the costs in both the circuit court and county court. The jurisdiction of the county court to establish this road was disputed in the county court; first, because that court did not, as required by section thirty-five of chapter fourteen of Acts of 1881, "appoint two or more viewers or a committee of their body to view the ground and make report;" but on June 6, 1881, said court in violation of law appointed all three members of the court a committee to make the view, it being supposed to be absurd, that the three members of the court should as a court instruct itself as a committee, or that the three members of the committee should report to the court which consists of the same three members. This does not strike me as an absurdity. If the court instructs the committee, the in-

structions are made a part of the record of the court; and thus on an appeal the circuit court would have a correct mode of knowing the views of the county court, which it is reviewing. Nor do I see any absurdity in the three persons, who are members of the court, reporting as a committee to the court in its corporate capacity; for in contemplation of law the county court as a corporate body is a body distinct from the several persons individually, who may happen to constitute the court. From the earliest day three viewers could be appointed to view a road; and indeed originally the county court could not appoint less than three persons as viewers. (R. C. of Va. of 1819, chap. 236, sec. 1.) It is true, that the Code of West Virginia, chapter forty-three, section thirty-five, allowed the board of supervisors to appoint two or more viewers or a committee of its own body to view a proposed road. Under this provision either three viewers or a committee composed of three supervisors might be appointed. After the county court had been substituted as the authority to establish county roads, that court was still authorized to appoint two or more viewers or a committee of their own body to view the proposed road. (Chapter 194, section 35 Acts of 1872–3; chapter 14, section 35, Acts of 1881.) As from the earliest period three persons might and usually did act as viewers of a public road, it seems that there is nothing in the last two acts, to which we have referred, to indicate that this long-established practice was intended to be overthrown. In authorizing a committee of its own body to act as viewers, doubtless the law intended, that two of its members might be appointed such committee, just as the law authorized two others to be appointed such committee; but as three others could always have been appointed such viewers, I see no ground for questioning the authority of the county court as a corporate body to appoint all three individuals constituting the court a committee to act as such viewers. I see nothing in either the wording or the spirit of the law requiring any other construction of the statute.

Again it is objected, that the county court of Hancock had no jurisdiction to establish this road, because the committee appointed to view the ground never made a sufficient report. The order made by the county court of Hancock

recites at full length and in detail all that was done by this committee consisting of the members of the court. So full are these recitals, that, if what is contained in them had been reduced to writing and signed by the three members of the committee, who were the members of the court, there could have been no question but this would have been a sufficient report. Now there is nothing in section thirty-five of chapter fourteen of Acts of 1881, which requires this report to be reduced to writing and signed by the members of the committee making the report. This is the most proper mode of making their report. Their signitures to it however are only desirable in order to identify the report as theirs. If the report is spread, as it was in this case, on the record-book of the county court and is then identified by the signature of the president of the court for and on behalf of the whole court, the contents of the report as well as its complete identification seem to have been as well established, as if the report had been formally reduced to writing as a report and signed by all the members of the committee. This irregularity therefore does not seem to me to be such, as ought to vitiate the proceedings in this case.

It is said that this order, in which the contents of this report was thus set out at length, was set aside at a subsequent court, and another order, which did not so fully recite the action of this committee, was substituted in its place; and therefore we should consider this case, just as if this order of August 23, 1881, containing the full recitals had never been made. Of course we must regard this order as no longer operative as an order, after it was set aside; but, as on the face of the order setting it aside it appears not to have been set aside, because the facts stated in it as the action of the committee were in any respect incorrect, I can see no reason, why this Court as well as the county court might not well consider these recitals in this order as the report of this committee, though it had ceased to be operative as an order of the court in its corporate capacity. There can be no question, that under our statute, if the county court is bound to pay to a proprietor of the land taken a just compensation in money, it can not compel such party to receive any part of his compensation in anything other than money, as for

instance the building by the county of additional fencing along the road. (*Chesapeake and Ohio Railroad Company* v. *Patton*, 6 W. Va. 147; *Railroad Company* v. *Halstead*, 7 W. Va. 301.

It is claimed, that the true spirit of the law as laid down in these cases was violated by the concluding part of the order made by the county court of Hancock on June 5, 1882, which was: "And it further appearing to the court, that the said defendants claim damages amounting to $500.00, and this court being willing to give only $25.00 and water-privileges, which offer the defendants refused to accept, it is hereby ordered, that proceedings be instituted and prosecuted in the circuit court of Hancock county pursuant to law to ascertain what will be a just compensation to the aforesaid proprietors or tenants, if any, for the lands proposed to be taken." Two bills of exceptions were taken to this order, but no specific objection was made to the offer of the county court, that it was not all in money but partly in money *and partly in water-pririleges.* The record fails to show what was meant by water-privileges, or that, had this offer been accepted, these defendants would have received any water-privileges, which they would not have had in any event. But regarding this as an improper manner, in which to offer compensation, and that the offer should have been made in money only, still I am unable to see, that in view of the proceedings taken subsequently these defendants can be regarded as having been prejudiced by the fact that the offer was made in this form. The statute, section thirty-seven of chapter fourteen of Acts 1881, provides:

"At any time, if the court have enough before them to enable them to ascertain what would be a just compensation to the proprietors or tenants, and such proprietors or tenants to accept what the court deems just, the said court upon such acceptance being reduced to writing and signed by the proprietors and tenants may determine to undertake the work."

Now suppose, that the court in making this offer of a just compensation should include in it something besides money as, for instance, the building of two fences one along each side of the road. This might be improper on the part of the court; but if the offers were made in writing and accepted

in writing by the proprietors and tenants, and the road should be opened by the court, and the fences built, could these proprietors then complain, that such road had been illegally established? It seems to me, they could not. They were not compelled to accept their compensation in anything other than money, but having done so they would be thereby estopped from complaining, and the cases we have cited would become entirely inapplicable.

But it is said, that they refused this offer of compensation made to them by the county court of Hancock. This they had a right to do; and in such case, section 38 of the said chapter provides: "If the compensation to be paid to any proprietor or tenant be fixed by agreement, the county court shall order proceedings to be instituted and prosecuted in its corporate name in the circuit court of the county pursuant to the forty-second chapter of this Code." This is just what the county court did; and the contingency, on which it had a right to do it, had arisen, that is, the compensation to be paid had not been fixed by agreement. On the contrary it appears, that the offer made by the county court had been expressly refused. The right therefore to institute these proceedings in the circuit court existed, whether their failure to agree with the tenants arose from a disagreement as to what was a just compensation in money or from the fact, that part of the compensation was, as is supposed, offered in *water-privileges*. If ultimately the tenants get more than the *offer in money*, excluding entirely their *water-privileges*, they will be entitled to their costs; and thus an offer in this form might prejudice the county court but it could not prejudice the tenant or proprietor. They got in this case their costs in the circuit court as well as in the county court and their just compensation exclusively in money as assessed by a jury of twelve freeholders on their demand. They have no ground then in this court to complain of the form, in which the county court made its offer of compensation.

It is claimed by the counsel for the plaintiffs, that whenever private property of an individual is to be divested by proceedings against his will, there must be a strict compliance with all the provisions of law, which are made for his protection and benefit. This is true, and if these provisions for

the protection and benefit of the land-owner are not strictly complied with, the proceedings will be ineffectual to divest the land-owner's title. They are not only conditions precedent, which must be complied with, before the land-owner's property can be disturbed; but the party seeking to divest him of his right of property against his will must show affirmatively such compliance with these conditions. (*Adams* v. *Clarksburg*, 23 W. Va. 207). It is claimed, that there was no such compliance with these conditions precedent, before this public road was established and the plaintiffs in error deprived of the use of their land against their consent. Is this true? The thirty-sixth section of chapter fourteen of Acts of 1881, page 163, provides "That the county court shall appoint a day for the hearing of the parties interested, and cause notice thereof to be given to the proprietors and tenants of the property which would have to be taken or injured to show cause against the same." From the very wording of this section it is apparent, that the owner of land is entitled to this notice before judgment appropriating his land can be entered and the road established. Indeed the constitutional right of the legislature to pass a statute authorizing the appropriation of private property for public uses by an *ex parte* proceeding without notice and against the consent of the owner might well be sustained. (See *The Baltimore & Ohio Rail Road Co.* v. *The Pittsburg, Wheeling & Kentucky Rail Road Co.* 17 W. Va. 633–4.) But our legislature has attempted nothing of the kind.

In this case the county court on December 7, 1881, pursuant to the above statute made an order fixing the 17th day of December for the hearing of the parties interested; but it did not order all the parties interested to be notified in the manner prescribed by law. It is true, that the order made on the 17th day of December recited, that certain parties named were summoned to show cause against the establishment of this road, and two of the parties thus summoned appeared and consented to the establishment of this road. But the third party recited to have been summoned set up no claim to damages and made no defence to the establishment of the road but did file an answer denying, that the court had jurisdiction to establish this road as a public road.

The court ordered proceedings to be instituted and prosecuted in the circuit court to ascertain what would be a just compensation to this party, and afterwards on November 4, 1882, ordered this road to be established without giving any notice to show cause against its establishment in the manner prescribed by law. However irregular these proceedings up to that time may have been, they were subsequently made regular; as the circuit court on appeal reversed the proceedings of the county court and by its order of March 30, 1882, declared, "that there is error in the proceedings of the county court in the matter of the establisment of said public road in the failure of the county court to appoint a day for the hearing and to cause notice to be given to the petitioners as proprietors of the property to be taken or injured to show cause against the same and for other errors upon the record appearing." Thereupon the circuit court remanded the case to the county court of Hancock with directions, that the said county court appoint a day for hearing and cause notice to be given to the appellants as proprietors of the property to be taken or injured to show cause, if any they have, against the establishment of the proposed road. When the case was returned to the county court, it did make the order, which it was instructed to make, on May 8, 1882, fixing the first day of the next June term of the court as the day for said hearing and ordering all the necessary and proper parties, naming them, to be summoned to show cause, if any they had, why this proposed road should not be established. They were all of them accordingly duly and legally summoned and on the return day, June 5, 1882, did show cause against the establisment of this road.

They claimed among other things $500.00 as their just compensation, while the court was willing to give them only $25.00 and water-privileges. This offer of the court they refused to accept; and thereupon the court ordered proceedings to be instituted and prosecuted in the circuit court of Hancock county in the name of the county court of Hancock county to ascertain what would be a just compensation to them for the lands proposed to be taken and other damages. We have already seen, that there was no irregularity or error in the order, of which the plaintiffs in error have a right to

complain in this court. By the proceedings in the circuit court the just compensation of these plaintiffs in error was found to be $76.00; and they were adjudged their costs in the circuit court. On the return of the case to the county court of Hancock the plaintiffs in error moved the court to abandon the proposed undertaking, which the court by its order of September 3, 1883, refused to do, and adjudged, that they recover of the petitioners for this road their costs and adjudged against the county court of Hancock in favor of these plaintiffs in error the $76.00 ascertained in the circuit court to be their just compensation and gave an order on the county-treasury for the amount. After the payment of all the costs in both courts and this $76.00 the proper road-surveyor was directed to take charge of said road and open the same as a public road. In all these proceedings after the return of the said case to the county court of Hancock county from the circuit court I can see no error prejudicial to the plaintiffs in error. The order of September 3, 1883 was the order establishing the road; it was made after notice had been given to the tenants to show cause against the establishment of the road on the first day of the June term 1882, after cause had been shown against it after the regular and proper ascertainment of the just compensation of all the proprietors of lands, who claimed any damages, which ascertainment was properly made in the circuit court, and after a compliance with all the provisions of the statute-law made for the protection and benefit of the proprietors of the lands taken.

It is claimed that the road established by these proceedings is not defined with necessary accuracy, and that its location is not shown by the record with reasonable certainty. There is nothing, it seems to me, in this objection. There is no difficulty in ascertaining from the record the exact location of the road.

The judgment of the circuit court of Hancock county rendered June 25, 1884, affirming the proceedings aforesaid and affirming the judgment of the county court of Hancock county must for these reasons be affirmed; and the defendant in error, the county court of Hancock county, must recover of the plaintiffs in error its costs in this court expended and $30.00 damages.

AFFIRMED.

WHEELING.

GREATHOUSE v. SAPP.

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Submitted June 12, 1885.—Decided June 27, 1885.

If in an action of trespass *quare clausum fregit* the damages recovered be less than $100.00, the defendant can not obtain a *writ of error* from this Court, though it appears from the record, that the title or boundaries of the land were drawn in question.

GREEN, JUDGE, furnishes the following statement of the case:

This was an action of trespass *quare clausum fregit* brought in November, 1880, in the circuit court of Preston county. The declaration filed at December rules, 1880, alleged, that the defendant broke into the close of the plaintiff in said county, describing it by metes and bounds, and cut down and destroyed trees, the property of the plaintiff, and also wheat growing thereon, the property of the plaintiff, took and carried away and converted to his own use to the plaintiff's damage $250.00. This declaration was demurred to, and issue was joined thereon, and the demurrer was overruled. On April 20, 1881, the defendant pleaded not guilty, and issue was joined thereon, and an order of survey was made by the court, and on December 5, 1882, a jury was sworn to try this issue, who on December 8, 1882, found a verdict for the plaintiff and assessed his damages at $12.00. The court then rendered a judgment for the plaintiff against the defendant for this $12.00 with interest thereon from that date and his costs. Four bills of exceptions were taken during the trial of this case by the defendant; one to the court allowing the plaintiff to introduce certain evidence, and the other three to the refusal of the court to give certain instructions to the jury at the instance of the defendant. No new trial was asked by the defendant. The defendant obtained a writ of error and *supersedeas* to this judgment rendered against him by the court.

Berkshire & Sturgiss for plaintiff in error.

John Brannon for defendant in error.

GREEN, JUDGE:

The first question to be decided is: Has this Court jurisdiction to hear and determine this case? The jurisdiction of this Court is declared in the Acts of 1882, chapter one hundred and fifty-six, section four. There are but two provisions in this statute conferring appellate jurisdiction on this Court, which it would be possible for any one to imagine conferred jurisdiction in this case on this Court. These provisions are: "Their appellate jurisdiction shall extend to civil cases when the matter in controversy exclusive of costs, is of greater value or amount than $100.00;" second, "in controversies concerning the title or boundaries of land." Neither of these clauses gives this Court jurisdiction in this case. To give this Court jurisdiction not only must the matter in controversy in the suit, on which the judgment was rendered, be of the value of $100.00 exclusive of costs, but the controversy in relation to the matter of that value must be continued by the writ of error. (See *Rymer* v. *Hawkins et al.*, 18 W. Va. 309, syl. 1, and 316 *et seq; Bee* v. *Burdett*, 23 W. Va. 748; *Neal* v. *Van Winkle*, 24 W. Va. 404; *McKinney* v. *Kirk & Bro.*, 9 W. Va. 32.)

Upon a writ of error by the defendant in this case the matter continued in controversy in this Court is only the amount of the judgment rendered by the court on December 8, 1882, that is, $12.00 with interest from that date and the costs of the defendant below. (*Lewis* v. *Long*, 3 Munf. 136 and other cases cited in *Rymer* v. *Hawkins et al.*, 18 W. Va. 316 *et seq.*) Nor has this Court any jurisdiction by virtue of the second clause above quoted; for this is not a controversy concerning the title or boundaries of land. It is true, that the bills of exception in this case show, that the title and bounds of the tract of land named in the declaration, for the breach of the close of which this action was brought, were drawn in question, the defendant by his evidence showing, that he claimed, that he and not the plaintiff had title to this land. "But in this action of trespass *quare clausum fregit* damages only are recovered; and although the title or bounds of land may be incidentally and collaterally brought in question, yet the value of the matter in controversy is from the very nature of the action the value of the damages sustained by the trespass;

and this, when the title or bounds of land may be drawn in question, as well as when it may in no manner be had in the dispute." The above language is quoted from Judge Cabell's opinion in *Hutchison* v. *Kellam* and *Lymbrich* v. *Seldon*, 3 Munf. 215–6; and I adopt it as expressing my views. In those cases it was decided (Syl. 2, 3 Munf. 202): "If in an action of trespass *quare clausum fregit* the damages recovered be less than $100.00, the defendant can not appeal to the court of appeals; notwithstanding it appears from the record that the title or bounds of lands were drawn in question." The law there conferred jurisdiction on the court of appeals in civil cases, when the matter in controversy exclusive of costs was of greater value or amount than $100.00, and in controversies concerning the title or boundaries of land. The language conferring this appellate jnrisdiction was almost identical with the first and second clauses of the Acts of West Virginia of 1882, chapter one hundred and fifty-six, and section four, as above quoted, conferring appellate jurisdiction on this Court as appears from said cases. But there also then existed another provision of law conferring jurisdiction, if a judgment be for a *freehold* or *franchise*. This has been omitted from our statute-law. Because it was in the law, when these old Virginia cases were decided, Judge Coulter was of opinion, that the court of appeals had jurisdiction in these causes. But the other judges thought, that despite this provision the Court had no jurisdiction in any case of trespass *quare clausum fregit*, in which the judgment was for less than $100.00, and the writ of error was sought on behalf of the defendant. This conclusion or its equivalent has been frequently approved by a number of subsequent cases in the Virginia court of appeals. (*Skipwith* v. *Young*, 5 Munf. 279; *Umbarger* v. *Walls*, 25 Grat. 177 *et seq.*; *Clark* v. *Brown*, 8 Grat. 549.)

Upon reason as well as on the express authority of these cases it seems to me obvious, that this Court has no jurisdiction in this case, the judgment rendered against the plaintiff in error being less than $100.00. If the judgment had exceeded $100.00 in amount, this Court would have had jurisdiction; but even then we could not have considered the case on its merits. For even had we been of opinion, that all the in-

structions, which the court refused to grant the defendant below ought to have been given, we would nevertheless have been obliged to refuse to set aside the judgment below and award a new trial to the defendant, because he did not ask the court below to grant him a new trial, and as an appellate court we could not have decided; that he was entitled to a new trial, and have awarded him one, as we could not as an appellate court decide a question not presented to or acted upon by the court below. The reasons which would have necessitated us to refuse to award a new trial in this case, if we had had jurisdiction, are set out at length in *Danks* v. *Rodeheaver*, *infra*.

For the reasons I have given this Court is without jurisdiction to determine any of the questions in controversy between the parties; and the writ of error and *supersedeas* granted in this case must be dismissed as improvidently awarded; and the plaintiff in error, Samuel G. Sapp, must pay to the defendant in error, Levi Greathouse, his costs expended in this Court.

WRIT DISMISSED.

WHEELING.

STATE *v.* BALLER.

Submitted June 19, 1885.—Decided June 27, 1885.

An indictment alleges, that C. B. unlawfully furnished one A. R. for the use of P. E. money to unlawfully induce P. E. to absent himself from the circuit court of the county at a certain term, to which he, P. E., had been summoned as a witness against said C. B. in a trial on an indictment against said C. B. then pending in said court, whereby the said C. B. attempted to obstruct and impede the administration of justice. HELD:

This indictment was fatally defective in not alleging, that A. R. paid or offered to pay said money to the witness P. E. to induce him to absent himself as such witness at said time from the circuit court. Without this the act done by the de-

fendant is not of such a nature as to constitute an attempt to commit the offence mentioned in the indictment; and therefore on motion of the defendant the court ought to have quashed this indictment. (. 102.)

GREEN, JUDGE, furnishes the following statement of the case:

On February 15, 1883, the grand jury of Wood county found the following indictment against Caroline Baller:

"STATE OF WEST VIRGINIA, WOOD COUNTY, TO WIT:

"The grand jurors of the State of West Virginia in and for the body of the county of Wood and now attending the said court, upon their oaths present that Caroline Baller, on the first day of January, A. D. 1883, in the said county of Wood, did unlawfully furnish to one John A. Ran, for the use of Peter Earl, and amount of money, to-wit, the sum of $3.00 to unlawfully induce the said Peter Earl, to absent himself from the circuit court of said county at the February term, 1883, of said court, to which said term he, the said Peter Earl, had been subpœnaed as a witness on behalf of the State of West Virginia against the said Caroline Baller in a case pending in said court upon an indictment for misdemeanor found by the grand jury of said county against the said Caroline Baller at the November term of said court, 1882, whereby the said Caroline Baller attempted to obstruct and impede the administration of justice in the said circuit court of Wood county contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State."

On July 19, 1883, the defendant moved the court to quash this indictment, which motion the court overruled; and thereupon she pleaded not guilty, and issue was joined. On July 26, 1883, this issue was tried by a jury, who found the defendant guilty as charged in this indictment, and on August 6, 1883, the defendant moved the court to arrest the judgment, which motion the court overruled and rendered judgment against the defendant for $25.00, the fine assessed by the court and costs, and that the defendant be confined in the jail of Wood county for one hour, and until this fine and costs were paid. The court stayed execution of this judgment on the defendant's motion for thirty days on her

giving bond and security in the penalty of $300.00 as required, which bond she gave.

From this judgment the defendant obtained a writ of error.

Leonard & Caldwell for plaintiff in error.

Alfred Caldwell, Attorney-General, for the State.

The question in this case is: Is the indictment sufficient?

The indictment is for attempting to prevent the attendance of a witness summoned to give evidence before the circuit court of Wood county, whereby the accused attempted to obstruct and impede the administration of justice in said court.

The attempted offence while a contempt of court is also indictable at common law. (Hawk. b. 1, c. 21, s. 15; *Comm.* v. *Reynolds*, 14 Gray 87.) The attempt is a misdemeanor. (*Rex* v. *Higgins*, 2 East 8; Whar. Am. Cr. Law 766, 767, and note b.) In England it has been held that merely soliciting another to commit a crime is an attempt. (1 Russ. Crimes 49.) In Virginia, to constitute an attempt, an actual ineffectual deed done in pursuance of and in furtherence of a design to commit the offence is required. (*Uhl's Case*, 6 Grat. 672.) The overt act need not be the last proximate act prior to the consummation of the offence attempted. (*Id.*) See also *Clark's Case*, 6 Grat. 675, and *Nutter's Case*, 8 Grat. 699.

The indictment in this case is in substance that recommended in Archb. Cr. Pr. & Pl. See 1 Whar. Cr. Law (8th ed.) 2 Chit. Cr. Law 234, 235, and 2 Archb. Cr. Pr. & Pl. 897,) and distinctly alleges the overt act, decided in Virginia to be necessary, and further that the money was furnished to unlawfully induce Peter Earl to absent himself from the court, he being a duly subpœnaed witness. If Earl did so absent himself, there can be no doubt that the effect would have been to obstruct and impede the administration of justice. The money was furnished for the purpose of unlawfully inducing the absence of the witness, and the indictment not only shows an overt act done, but also the unlawful intent with which it was done. From her acts and intention as alleged in the indictment the conclusion that she *thereby* attempted to obstruct and impede the administration of justice in the circuit court of Wood county is legitimate and proper.

The ways in which such obstruction could be attempted are as varied as human actions, but one way attempted it is insisted is properly pleaded in the indictment.

GREEN, JUDGE:

The only question involved in this case is: Was the indictment in this case good? The only defect claimed by the counsel for the plaintiff in error is, that it charges that the defendant below did unlawfully furnish to Ran for the use of Earl $3.00 to unlawfully induce Earl to absent himself from the circuit court of said county at the February term, 1883, as a witness on behalf of the State in the trial of an indictment against the defendant below, whereby she the defendant below *attempted* to obstruct the administration of justice. It is claimed by the counsel for the plaintiff in error, that the facts alleged in this indictment are insufficient to show, that the defendant below did attempt to obstruct the administration of justice, as the giving by her of money to a third party to be given by him to a witness to prevent his attendance as a witness on the trial of a case does not amount legally to an attempt to obstruct the administration of justice, unless this third party gave or tendered this money to the witness or in some other way attempted to induce this witness to absent himself as a witness in that case; and that the indictment was therefore fatally defective, because there was no allegation that any inducement was presented to the witness to absent himself as a witness on the trial of this case. The question to be decided is: Was such an allegation necessary to complete the offence charged in the indictment, an attempt to obstruct and impede the administration of justice?

In the case of *Cunningham* v. *The State*, 44 Miss. 701 the court say: "The doctrine of attempt to commit a substantive crime is one of the most important and at the same time most intricate titles of the criminal law. There is no title, indeed, less understood by the courts, or more obscure in the text-books than that of attempts. There must be an attempt to commit a crime, and an act towards its consummation. So long as the act rests in bare intention, it is not punishable; but immediately when an act is done, the law judges not only the act done but of the intent, with which it was done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal and punishable."

An attempt to obstruct or impede the administration fo

justice by inducing a witness to absent himself from court is unquestionably a misdemeanor. It was a misdemeanor at common law. (Hawkins' Pleas of the Crown Book 1 chap. 21 sec. 15 p. 90; *Commonwealth* v. *Reynolds*, 14 Gray 89; *State* v. *Keys*, 8 Vt. 57; *State* v. *Carpenter*, 20 Vt. 9.) And it was declared a misdemeanor by the Code of W. Va. chap. 147 sec. 30 p. 691. This provision in our Code was amended on March 23, 1882, sec. 1, ch. 134; and by this amendment the punishment of either obstructing or impeding the administration of justice in any court or the attempt so to do was fixed at a fine of not less than $25.00 nor more than $200.00 and imprisonment in the county jail not exceeding six months.

As before said, it is obvious, that an indictable attempt to commit this or any other crime must consist of something more than a mere intention to commit the crime. The very word used in the above statute, which declares an *attempt* to obstruct the administration of justice a misdemeanor, implies, that this misdemeanor can be committed only by some act intended to result in the crime. An indictable attempt is therefore such an intentional preparatory act as will apparently result, if not extrinsically hindered, in a crime, which it was designed to effect. This is the definition given by Wharton in his Commercial Law (eighth edition) chapter eight, section one hundred and seventy-three. The great difficulty is to determine, what must be the nature of these preliminary acts and the nature of their connection with the intended crime, so as to make them an indictable attempt to commit such crime. These preliminary acts, if connected with the intended crime only as a *condition* as distinguished from a *cause*, can never according to the better authorities constitute an indictable attempt to commit such crime. While it is often not difficult to distinguish a *condition* from a *cause*, yet they frequently approximate so closely, that it becomes exceedingly difficult to distinguish them. By *cause* is meant that *condition* which determines the final result. As illustrating the difference between a *cause* and a condition I will put the case of the death of a child proceeding from suffocation produced by forcing moss into the child's throat. This would still be considered the *cause*, as the swelling arose

from the forcing of the moss into the child's throat, though the immediate occasion of the child's death was the swelling up of the passages of the throat causing suffocation. In this case the swelling of the throat, which occasioned the suffocation, was the *condition* of the death, while the *cause* of it was the forcing of the moss into the throat. This illustration is found in Wharton's Criminal Law (8th Ed.) Book 1, sec. 154, p. 184. In the same section is the following illustration: "Iron is dug from a mine, is melted in a furnace, is shapen in a factory, is sold as a weapon by a tradesman, is used to inflict a fatal wound by an assassin. Now the mining, the melting, the shaping, the selling are all *conditions* of the murder, without which it could not in the line, in which it was effected, have taken place; but none of these acts is a *cause* of the murder, unless the particular act was done in concert with the murderer, to aid him in effecting his purpose."

Perhaps we can not get a clearer conception of the nature of these preliminary acts and of the character of their connection with the intended crime, which made them an indictable attempt to commit such crime, than by referring to some cases, which have either actually arisen, or which have been stated as illustrations by eminent judges in deciding cases. I do not say, that from these cases any rule can be drawn, which would lead us to certain results in many cases, which might arise; nor do I say, that these cases are all of them reconcilable in principle. Still they will aid us in making correct conclusions in this case; and they will illustrate the inherent difficulty and the great obscurity, which arises, when we undertake to determine, whether certain acts are or are not indictable attempts to commit a crime. An indictment lies for attempting to pursuade a witness not to appear and give evidence. (*Rex* v. *Lanley*, 2 Strange 904; *State* v. *Keyes*, 8 Vt. 57; *State* v. *Carpenter*, 20 Vt. 9). An indictment lies, where a party sends a letter to another offering to bribe a minister of state, or where one sends a letter denouncing another with the expressed intention of provoking him to send a challenge to fight. In either case the sending of such letter was a step towards the misdemeanor intended to be accomplished, the corrept abuse of a minister of his official position or the sending of a challenge. The

sending of such letter is an indictable attempt to cause the commission of such misdemeanor. (*King* v. *Philips*, 6 East 464.) It is an indictable offence to solicit a servant to steal his master's goods, though they were not stolen nor any act done except the soliciting. Such soliciting is an indictable attempt to cause larceny to be committed. (*King* v. *Higgins*, 2 East 5.) If a man intends to commit murder, the walking to the place, where he intends to commit it, would not be a sufficient act to make it an indictable offence. (Irwin. C J. in *Rex* v. *Roberts*, 33 Eng. Law & Eq. 539; Dears 553.) So if a man intended to carnally abuse a child and was to take his horse and ride to the place, where the child was, that would be a step towards the commission of this offence, but would not be indictable. (Lord Abinger in *Rex* v. *Meredith*, 8 C. & P. 589.) In the two last cases supposed the acts done stood in relation to the crimes intended to be committed as *conditions* not as *causes;* and for that reason, I presume, it was held that they were not indictable attempts. So too and for a like reason the buying of a box of lucifer matches with intent to set fire to a house is not an indictable offence. (Pollock C. B. in *Rex* v. *Taylor*, 1 F. & F. 511). An attempt to produce a miscarriage is indictable, though it turn out that the woman was not actually pregnant. (*Rex* v. *Goodall*, 2 Cox, C. C. 40.)

In some cases acts preparatory to the commission of a crime are themselves a crime and indictable as such, and not as an attempt to commit the crime. Decisions based upon the doing of such acts, as constitute a substantial crime in themselves, should be distinguished from those decisions which hold certain acts to be crimes, only on the ground that they are attempts to commit crimes. As examples of cases, where the doing of certain preliminary acts, which look to the commission of certain crimes, are regarded *per se* as indictable, as substantive crimes and not properly as attempts to commit the future crime contemplated, I may refer to the carrying of concealed weapons. Whether or not carried with the specific purpose of being used to assail a particular individual this is a substantive crime and should be indicted as in itself a crime and not as an attempt to commit a crime, even though they were carried

with the specific intent of assailing a certain person. So the procuring of dies, wherewith to counterfeit, is an indictable offence *per se* and should be indicted as an independent misdemeanor and not as an attempt to counterfeit. It is on this ground that the conclusion reached in *Rex* v. *Roberts*, 33 Eng. Law & Eq. 539 (Dears 553) can be sustained.

It is some times difficult to determine, whether the facts in a particular case constitute *per se* a substantive crime or only an attempt to commit a crime. I shall not undertake to lay down any rules by which the one may be distinguished from the other. And some of the cases, which have been or may be put as examples in this opinion, may constitute substantive crimes and ought not perhaps for that reason to be regarded as illustrations of attempts to commit crimes. I regard it in this case as sufficient to call attention to the existence of a difference between such substantive offences and attempts to commit crime. This difference will aid in some instances in reconciling cases with each other, which may at first sight appear to be in conflict.

I will state a few additional cases, which have arisen, and which throw some light on the questions arising in this case. Thus it has been held, that it is not an indictable offence to have possession of forged bank-bills of the bank of A., no such bank in fact existing, with the intent to pass them as genuine bills. For this amounts to nothing but an intent to cheat; which at common law is not indictable. (*Commonwealth* v. *Moyer*, 2 Mass. 138.) If an indictment charged that A. "with force and arms unlawfully and wickedly did attempt to pick the pocket of one B. with intent then and there feloniously to steal, take and carry away the goods and chattels moneys and property of the said B.," it is fatally defective. (*Randolph* v. *Commonwealth*, 6 Searg. & R. 398.) This indictment was held fatally defective, because there can be no attempt to commit a crime without the doing of some act; and it is absolutely necessary for the indictment to state the act done, which is claimed to constitute the attempt, in order to give the accused an opportunity of disproving that he did the specific act alleged, and also to enable the court to determine, whether, what it is claimed he did, was an indictable offence. This decision seems to me to be obviously correct;

yet it was held in the *People* v. *Bush*, 4 Hill (N. Y.) 134, that in an indictment for attempting to commit an offence the particular manner, in which the attempt was made, need not be stated. This, it seems to me, was not the only error committed by the court in that case. The evidence in the case was that the defendant requested one Kinney to set fire to Sheldon's barn offering him a reward; that afterwards, understanding and believing Kinney would set fire to the barn, the defendant gave him a match for the purpose, not meaning to be present himself at the doing of the act. It clearly appeared, that Kinney never intended to commit the crime. The court held that the attempt to commit arson was sufficiently proven and the defendant properly convicted. This decision was based on the case of *King* v. *Higgins*, 2 East 5, before cited, where it was decided that the soliciting of one to steal was itself a sufficient act to complete the offence of attempting to steal.

There is no question but that solicitations to do certain acts or commit certain crimes are indictable, as for instance, if the object is to provoke the breach of public peace, as in challenges to fight a duel or seditious addresses or the counselling of the resistance of a judicial writ,or when the object of the solicitation is to defeat public justice, as where perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. But in these cases these solicitations constitute at common law substantive offences, which are *per se* punishable as misdemeanors, and it is not as attempts to commit crimes that they are punishable. Except in those few cases, in which the common law made solicitation to do certain acts a substantive crime, it seems to me that solicitation to commit a crime is generally not a substantive crime and never can be properly an attempt to commit a crime. As I understand them, the great mass of judicial decisions proceed on the assumption, that an attempt to commit a crime, is such an intentional preliminary act, as will apparently result in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this can not be said of mere advise given to another, which he is at full liberty to accept or reject.

That this is a correct view may be deduced from *Smith* v. *Com.* 54 Pa. St. 209, where it was held, that a solicitation to commit adultery was not indictable at common law; *vide State* v. *Avery*, 7 Conn. 266. So it is held, that pursuading to consent to incest without any act done towards actual consummation is not an indictable attempt. (*Cox* v. *People*, 82 Ill. 191.) So a person, who induces one to sell him spirituous liquors, knowing that the seller is committing a misdemeanor, is not guilty of any indictable offence. (*Commowealth* v. *Willard*, 22 Pick. 476).

It is not however at all necessary in this case to decide in what cases a solicitation of another to commit a crime would be of itself a substantive crime at common law, or whether in any case such solicitation accompanied by no act tending to a specific crime could ever be an indictable attempt to commit such crime. But I will say, that when the crime, which one is solicited to commit, has for its object an interference with public justice, for instance, the procuring of a witness to absent himself from court so as to avoid testifying, when he had been summoned to testify, there can be no doubt that at common law such a solicitation would be a misdemeanor in itself. (*State* v. *Caldwell*, 2 Tyler 212; *People* v. *Washburne*, 10 Johns. 160; *Walsh* v. *People*, 65 Ill. 58; *Jackson* v. *State*, 43 Tex. 421; *State* v. *Keys*, 8 Vt. 57; *State* v. *Carpenter*, 20 Vt. 9; *State* v. *Early*, 3 Harr. 562; *Comm.* v. *Reynolds*, 14 Gray 87; *Martin* v. *State*, 28 Ala. 71).

In my judgment the fact, that in the case of *People* v. *Bush*, 4 Hill 134 it was proven in addition to the solicitation of the defendant to Kenny to burn the barn, that the defendant furnished to Kenny a box of matches, wherewith to burn the barn, did not add the least strength to the case made out by the State. If the defendant had bought a box of matches with the declared intent to burn the barn, that would not have made him guilty of an attempt to burn the barn, any more than the purchasing of a pistol with the intent of shooting a man would of itself make one guilty of an attempt to murder.

The case of *The People* v. *Lawton*, 56 Barb. 126 based principally upon the case in 4 Hill is in my judgment much less objectionable; and indeed it may probably be sustained on

sound principles. But it certainly stands very near the boundary, when preparatory acts are to be held as indictable attempts, and when they should not be so held. The proof was, that the prisoner had reconnoitered the premises and agreed with a witness at the trial that about ten o'clock of a particular night they would commit a burglary by entering the store of B.; that in pursuance of such design and agreement at about the hour of one they went to the store through an alley in its rear; that the prisoner carried or caused to be carried there a set of burglars' tools to aid them in committing the burglary; that when they arrived the prisoner suggested that none of the tools were strong enough to enable them to force an entrance; that they then concluded to enter a blacksmith shop close by for the purpose of getting a crow-bar or some other tool, with which to break into the store; and that before they entered the shop an alarm was given, and they were interrupted and were prevented from executing their intended purpose, not however abandoning their design. The court held, that this evidence was sufficient to support a conviction. The court say in their opinion p. 134: All the cases cited "concur in saying that in order to constitute the *attempt*, there must appear to have been more than the design or intention to commit the offence. There must have been some ineffectual act or acts toward its accomplishment. (Wharton's Criminal Law sec. 2,702; 6 Grat. 706; 5 Cush. 367.) But none of them tend to establish that acts analagous to those proved in this case do not constitute an attempt. The only case which appears in the least to conflict with it is the *nise prius* case of *Regina* v. *Meredith*, 8 Car. & Payne, 589, where Lord Abinger said, he thought some illegal act should be proved, to constitute the offence; and illustrated the suggestion by supposing that when a man was indicted for an attempt to have connection with a female child between the ages of ten and twelve years, and the proof showed he took his horse and rode to the place, where the girl was, he thought such an act would not constitute an attempt. We think the riding of the horse would not be an act towards the commission of the offence. While the taking of burglars' tools and crow-bars to the place designed to be broken open would be acts done towards its accomplishment."

This reasoning is far different from that in the *The People* v. *Burk*, 4 Hill, which the court afterwards say covers this case completely. Certainly we can not infer from this reasoning, that mere solicitations to commit a crime would make a party indictable for an attempt to commit such crime. But we could infer the very reverse. Yet this was the ground on which this case in 4 Hill was based. If it were a sound ground, why did the court in the case in 56 Barb. enquire into the character of the *preparatory acts*, if the simple fact, that the person had solicited or induced the witness to undertake the burglary, would *alone* have made the prisoner guilty of an attempt to commit this crime? It seems to me quite clear that advice given to another, which he is at full liberty to accept or reject, can not be regarded as an act towards the commission of a crime. For such advice would not apparently result in the usual course of natural events in the commission of the crime, and if it would not, then, it seems to me, it can not legally be regarded as an act towards the commission of the crime. I am also inclined to think, that the taking of burglars' tools to a store with intent to break it open without using them in any manner can not legally be regarded as an attempt to commit burglary, because such act, it seems to me, is not one which would apparently result in the usual course of natural events in the commission of the burglary. But it seems to me a nice question, and I may be mistaken in my first impression.

The case is thus stated in the syllabus of *Uhl et als.* v. *The Commonwealth*, 6 Grat. 706: "On an indictment against several for an attempt to burn a barn, held: That an attempt according to the true intent and meaning of the statute, can only be made by an actual, ineffectual deed done in pursuance of, and in furtherance of, the design to commit the offence. But if the parties combined to commit the offence, and they all assented to it, and a part of them only went to do the act, those who were absent knowing with what intent the others went to the place, and assenting to the same, are principals in the offence. The overt act done in the attempt to commit the offence, need not be the last proximate act prior to the commission of the fellony attempted to be perpetrated." The general court in that case delivered no

opinion and referred to no authorities. The syllabus is substantially the instruction given by the court below. The facts are not stated; and it therefore does not appear what, if any thing, was done towards the burning of the barn by those who went there for the purpose.

In the *Commonwealth* v. *Clark*, 6 Grat. 675, the general court decided, that, "An indictment for an attempt to commit an offence ought to allege some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment." No opinion was delivered by the court, nor are the facts sufficiently stated to ascertain accurately what the indictment stated, which the general court quashed as insufficient. But as in the argument the New York cases were referred to, I presume the court by its decision intended to disapprove the case of *The People* v. *Bush*, 4 Hill, which was decided some six years before this Virginia case.

It is very difficult to deduce from the cases we have cited or from the reports of many other cases, which I have examined but not cited, any principle so clear as to enable us to determine with certainty, whether upon many states of facts in particular cases a party has or has not been guilty of an indictable attempt to commit a crime. But it seems to me that these cases show clearly enough certain general principles, which, when applied to the case actually before us, will enable us to reach a distinct conclusion. In the first place there can be no question but that to solicit or in any manner induce a witness to absent himself from a trial, in which the witness has been summoned to testify, is an indictable offence, though it is questionable whether in general the solicitation of a person to commit a crime is indictable, and it is clear that there are many crimes, to commit which the mere solicitation would not be an indictable offence. If therefore the defendant below had induced by giving money or by any other act attempted to induce the witness Earl to absent himself from the court on the trial of the indictment pending against the defendant below, whether this inducement came directly from the defendant below or indirectly through Ran, she would clearly have committed an indictable offence. But the allegations in the indictment utterly fail to show, that the

defendant Caroline Baller either directly or indirectly did anything to induce Earl, the witness, or which could have operated on his mind so as to induce him to absent himself from the court as a witness against the defendant. The allegation is, that she gave Ran money for the witness to induce the witness to absent himself from court as a witness against her. But as there is no allegation that Ran gave this money to the witness, or ever even saw the witness, it is obvious that the giving of money to Ran for the witness to induce him to absent himself from court could have had no tendency to produce such result, if the witness never received the money, and Ran never spoke to him on the subject; and there is no allegation in the indictment, that he ever did. If he had given this money to the witness to induce him to stay away from the court as a witness, then, whether he had staid away or not, she could have been indicted for obstructing and impeding or for attempting to obstruct and impede the administration of justice.

The authorities all agree, that on an indictment for attempting to commit any crime it is not necessary in any case to allege or prove, that the crime was actually committed; but the indictment in such case must specifically allege, what the crime is, which the accused is charged with attempting to commit or to procure to be committed. The indictment in this cese is entirely correct in this respect. It alleges, that the crime, the committing of which the defendant attempted to procure was "that Peter Earl should absent himself from the circuit court of Wood county at the February term 1883, to which said term he, the said Peter Earl, had been summoned as a witness on behalf of the State of West Virginia against said Caroline Baller, the defendant, in a case pending in said court upon an indictment for misdemeanor against the said Caroline Baller at the November term of said court 1882." This is an abundantly full and perfect description of the crime, which it is alleged the defendant Caroline Baller attempted to induce Peter Earl to commit. The indictment did not allege, that Peter ever committed this crime; and the authorities all show, that there was no necessity that it should. The great weight of authority and reason, as we have seen, lay it down that the preparatory acts done by the

accused, and which constitute the offence of attempting to procure the committing of a certain crime must be stated to have been actually done and must be proven to have been done as stated. It is true that in the *People* v. *Bush*, 4 Hill it was held, that in an indictment for attempting to commit an offence the particular facts, which constitute the attempt, need not be alleged. But this is contrary to both reason and authority. I have seen no other case, in which this has been held to be law. In *Randolph* v. *The Commonwealth*, 6 Serg. & R. it was decided otherwise; and the court said there were no precedents in support of such an indictment, as was held good in 4 Hill; and in the *Commonwealth* v. *Clark*, 6 Grat. 675 the position taken in 4 Hill was condemned, for the court expressly held: "the indictment for the attempt to commit an offence ought to allege some act done by the defendant of such a nature as to constitute an attempt to commit the offence mentioned in the indictment."

In the case before us the indictment does allege some act done by the defendant, which, it is claimed in argument, was "of such a nature as to constitute an attempt to commit the offence mentioned in the indictment." The act done by the defendant alleged in the indictment and claimed to be of such a nature as to constitute the attempt to get Peter Earl to commit the offence of absenting himself from attendance at the circuit court as a witness against the defendant was, that "she did unlawfully furnish one Ran with money for Peter Earl to induce him to commit said offence." And the question is: Was this of such a nature as to constitute an attempt to commit this offence? It seems to me clear both on reason and the authorities that it was not. The act done by the accused alleged in the indictment, it would seem obvious, can not be independent and unconnected in any manner with the acts, which, if done, would constitute the crime, which the accused is indicted as having attempted to commit or procure to be committed. The weight of authority, as I have stated, seem to show, that these acts done by the defendant and the acts constituting the crime attempted should be the cause of the other. But an examination of the cases, which we have cited, shows that there are some cases which have been decided, which seem to hold, that the acts done

by the defendant should be related to the acts, which constitute the crime attempted, not as crime necessarily, but that it will suffice, if the first is only a condition of the other. Of this character apparently are the cases of *The People* v. *Bush*, 4 Hill 134 and *The People* v. *Lawton*, 56 Barb. 126. But I have seen no case, which intimates, that the acts done by the accused need not be related to the acts constituting the attempted crime either as causes or as conditions.

In the case before us these acts done by the defendant are neither the cause nor a condition of the acts constituting the crime alleged to be attempted. A *condition* of any crime is the act or acts without which it would not have occurred. A cause is that *condition*, which determines the final result; or it may be defined as the *preponderating* condition. See Wharton's Criminal Law, eighth edition, Vol. 1, secs. 153 and 154. We have already given illustrations of causes and conditions, which will, I think, suffice to show, what is meant by these words. In *Washington* v. *The B. & O. R. R. Co.*, 17 W. Va. 197 *et seq.* many cases are cited, which when carefully considered will enable us to distinguish between what is properly called a cause and what should be called a condition merely. Though in these cases cited and in the case of *Washington* v. *The B. & O. R. R. Co.* there is no attempt to draw formally the distinction between a cause and a condition; and I do not know, that the term "condition" is used in any of the cases. Still in very many of them certain facts stated in them as not causes are still connected with the result; and this remote connection not being a cause is what we here call a condition. But it is apparent that the fact as alleged in the indictment, that "Caroline Baller," the defendant below, "on the 1st day of January, 1883, in said county of Wood did unlawfully furnish to one John A. Ran for the use of Peter Earl an amount of money, to wit, the sum of $3.00 to unlawfully induce the said Peter Earl to absent himself from the circuit court of said county at the February term 1883 of said court" could not possibly be either a cause or a condition of his, Peter Earl's, absenting himself from the circuit court of Wood at the February term, 1883, unless Ran gave these $3.00 to Earl to induce him to so absent himself, or saw said Earl and by his communication with him endeavored in some

manner to influence him to absent himself from said term of said court. If Ran never saw Earl, then of course the giving of this money by the defendant below for this alleged purpose could not possibly have operated in any manner to induce said Earl to absent himself from the said term of said court to avoid being a witness against the defendant. The two acts, the giving of the money by the defendant below for this illegal purpose and the absenting of Earl from this term of the circuit court, are entirely independent acts, and the one could not possibly influence the other, if Earl was in no manner communicated with; and there is no allegation in the indictment that he was. In the absence of any such allegation the simple giving of this money by the accused to a third person for Earl is a fact of such a nature, that it could not possibly constitute an attempt to induce Earl to commit the offence of absenting himself from the circuit court as a witness against the accused. The indictment really amounts to nothing more than that the accused intended to induce Earl, a witness against her in an indictment there pending, not to appear as a witness against her and indicated this intention by a certain transaction, which she had with a third party. Of course she can not be indicted, as all the authorities show, for entertaining such intention, however immoral it may be regarded, and however clearly it may be shown that she did entertain it. This being the case the circuit court ought to have quashed this indictment when her counsel moved the court to quash it on July 19, 1883.

For this reason the judgment of the court below rendered on August 6, 1883, must be reversed and annulled; and this court proceeding to render such judgment, as the court below ought to have rendered, must quash this indictment.

INDICTMENT QUASHED.

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WHEELING.

STATE v. MILLER.

Submitted June 23, 1885.—Decided June 27, 1885.

1. While it is the usual practice, where a jury is waived, and the case submitted to the court in lieu of a jury, if the party, against

whom the judgment is rendered, is dissatisfied therewith, to except to the judgment and have the court certify the facts proved, yet it is not necessary for the record to show, that the judgment was excepted to. It is sufficient, if the facts appear upon the record either by the certificate of the court or otherwise. (p. 109.)

2. In such a case upon review in the appellate court the case will be regarded as on demurrer to evidence, and the plaintiff in error the demurrant. (p. 109.)

3. A case reversed because the facts proved are plainly insufficient to warrant the judgment; the defendant having been indicted for *selling* spirituous liquors, &c., and the proof showing that he was a *purchaser* not a seller. (p. 110.)

4. Upon review of a case tried by the court in lieu of a jury, if the evidence was plainly insufficient to warrant the judgment, the appellate court will reverse the judgment and render judgment for defendant. (p. 110.)

The facts of the case appear in the opinion of the Court:

Kenna & Chilton for plaintiff in error.

Alfred Caldwell, Attorney General, for the State.

JOHNSON, PRESIDENT:

The defendant, Miller, was indicted in the circuit court of Logan county for selling spirituous liquors, &c. without license.

On the 5th day of July, 1883, the case was heard before the court in lieu of a jury, and the court on the issue joined on the plea of not guilty found the defendant guilty and assessed a fine of $10.00 against him. The record states: "Thereupon the defendant by his attorney moved the court to set aside the *verdict* and grant him a new trial, because the same is contrary to the law and the evidence and is insufficient to warrant said finding," which motion the court overruled, to which ruling of the court the defendant excepts, and tenders his bill of exceptions, &c. Then follows the bill of exceptions, which certifies the evidence. The whole evidence for the State is as follows: "The State to maintain the issue on her part introduced one F. M. Aldridge, as a witness and proved the following facts: That witness, Dr. Waldron, E. Gibson, and defendant were together in a room at

Logan C. H., Logan county; that Dr. Waldron wanted some whisky and asked witness Aldridge to go and get some for him; that witness asked Miller if he knew where whisky could be got, and defendant told witness that he thought he could get some from one J. B. Buskirk; that witness went out of the room and was gone some time, and then returned and said he could get none; that defendant then at the request of Dr. Waldron, took the bottle and money (fifty cents) and went away and after a little while returned with a pint of whisky and gave it to Dr. Waldron, which the party drank; that this occurred within the county of Logan, and within one year previous to the finding of the indictment"; and here the State rested the case.

Why the defendant thought it necessary to introduce any evidence is hard to understand, but he did. He was himself sworn and stated how and where he got the whisky. He said he took the bottle and money and went to the shed of Buskirk's barn, saw a colored man there; laid the bottle and money down on the head of a barrel under the shed, and went away, and in a short time went back, and found the bottle filled with whisky lying on the head of the barrel and the money gone; he took the whisky to Dr. Waldron, and the party drank it; that he did not know, who filled the bottle; that he was told by George Steele that he could get whisky by leaving his money and bottle there; had no arrangement or understanding with any one about selling said whisky; was interested in no way in selling said whisky; got the same for Dr. Waldron at his request; that he had several times, after said Steele had given him the information, got whisky at the same place in the same way.

J. B. Buskirk was sworn as a witness for defendant and said, that at no time did defendant ever have any understanding or arrangement with witness to aid or assist him in selling whisky.

The bill of exceptions states: "And these being all the facts proved by both the State and the defendant, the court found the defendant guilty and assessed his fine at $10.00; and thereupon the defendant moved the court to set aside the said *verdict* as being contrary to the law and the evidence, which motion the court overruled and proceeded to render

judgment on said *verdict*, to which ruling of the court in finding the defendant guilty, and refusing to set aside said finding the defendant excepts, &c."

To the judgment of the court the defendant obtained a writ of error.

It is here contended by the Attorney-General, that, inasmuch as the case was tried by the court without a jury, the defendant waived all objections to the judgment by failing to except thereto, and by failing to move to set it aside. Because the case was tried by the court in lieu of a jury, it was unnessary to except to the judgment or move to set it aside. While it is the usual practice in cases, where a jury is waived and the case submitted to the court in lieu of a jury, if the party, against whom the judgment is rendered, is dissatisfied therewith, to except to the judgment and have the court certify the facts proved, yet it is not necessary for the record to show that the judgment was excepted to. It is sufficient, if the facts appear upon the record by certificate of the court or otherwise. In such case this court will inspect the record and either affirm or reverse the judgment, as the law requires. It seems to be a useless formality to except to the judgment of a court in such a case. An exception might as well be taken to a decree in chancery. (*Beard, &c.* v. *Parsons*, 24 W. Va. 551.) Here the facts were all certified by the court and thus made a part of the record.

It is well settled, that upon a review of a judgment of the court in a case submitted to the court in lieu of a jury it will be by the appellate court regarded as upon a demurrer to evidence, considering the plaintiff in error as the demurrant. (*Id.*)

Upon the well established principles of a demurrer to evidence what evidence is there in this record that the defendant *sold* spirituous liquors, &c.? There is abundant evidence that he *bought* whisky as the agent of Dr. Waldron; but none whatever that he *sold* any either for himself or as the agent of another. It is argued by the Attorney General, and cases are cited to support the position, that a clerk or agent is responsible in case of a sale made by him, when his principal has no license. This position is sound; but the trouble is, there is not the slightest evidence of the fact, or any evidence of any other fact, from which the inference could have been

drawn by the court, that the defendant was the agent of any one for the *sale* of the liquor, which he procured for Dr. Waldron; but the evidence was produced by the State that he was the agent of Dr. Waldron for the *purchase* of the whisky.

Under our statute a man can not be subjected to any penalty for the *purchase* of whisky or other intoxicants, but only for *the sale* thereof without license. It has been so held under the Massachusetts statute. (*Commonwealth* v. *Willard*, 22 Pick. 476.) As in the cases of the *State* v. *Thomas*, 13 W. Va. 847; *State* v. *Haymond*, 20 W. Va. 21, and *State* v. *Ferrell*, 22 W. Va. 759, the evidence is clearly insufficient to sustain the judgment of the court. In fact there is no evidence upon which the judgment can rest.

In a case like this, where the appellate court comes to the conclusion, that the judgment of the circuit court was plainly erroneous, it will not remand the case for a new trial, but will enter such judgment on the law and evidence, as the court below should have rendered. (*Nutter* v. *Sydenstricker*, 11 W. Va. 535.)

The judgment of the circuit court is reversed; and this Court proceeding to render such judgment as the circuit court should have rendered, judgment is rendered for the defendant.

REVERSED.

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WHEELING.

STATE v. HOWES.

Submitted June 12, 1885.—Decided June 27, 1885.

1. An indictment may be fatally defective as an indictment for robbery yet good for an assault. (p. 112.)

2. If such indictment attempts to charge the offence of robbery and is bad for that offence and charges an assault, it is good for the lesser offence, and a motion to quash such indictment is properly overruled. (p. 114.)

3. Mere surplusage in an indictment will not vitiate it; and therefore where an indictment alleges facts, which constitute a misdemeanor, it will be good for that offence, although it states other facts, which go to constitute a felony, but falls short of stating sufficient facts to constitute that crime. (p.. 114)

4. Verdicts in neither civil nor criminal cases will be set aside for objections to jurors on grounds, which existed before they were sworn, unless it appears that by reason of the existence of such grounds the party objecting has suffered wrong or injustice; and in no case would a verdict be set aside for a matter, which was a principal ground of challenge to a juror, unless it was shown to the court, that such juror had prejudged the case. (p. 115.)

5. A verdict in a misdemeanor case will not be set aside, because the sheriff of the county had, after the jury was sworn, made a bet that the jury would find the defendant guilty. (p. 116.)

The facts of the case sufficiently appear in the opinion of the Court.

T. A. Bradford and *S. Dayton* for plaintiff in error.

Alfred Caldwell, Attorney General, for the State.

JOHNSON, PRESIDENT:

At the March term, 1882, of the circuit court of Barbour county the defendant was indicted for robbery; but the indictment failed to charge, that the property was taken from the person forcibly and against the will of the party from whom taken. The indictment for robbery is here of course admitted by the State to be bad. A motion to quash the indictment was overruled; and the defendant pleaded not guilty. The jury found the defendant not guilty of the felony charged, but found him "guilty of an assault, upon John Prim as charged in the indictment."

The defendant moved the court to set aside the verdict and grant a new trial. This motion was based on several grounds. The court overruled the motion and entered judgment, that defendant pay a fine of $100.00 to the State and be imprisoned in the jail of Barbour county for twelve months.

After the verdict was rendered, the defendant filed his affidavit, in which he states: "That James E. Heatherly, who had the said jury in charge, actually made a bet with Dr. G. B. Harvey, and the stakes were put up in the hands of J. M.

Woodford as stakeholder, that the said jury would convict affiant, when they returned their verdict into court." He further in said affidavit stated, that Thomas Moran, one of the jurors who tried affiant, had made up and expressed his opinion about the case before he was sworn, and that knowledge of the same did not come to affiant until after the verdict was rendered; that another juror, Silas Upton, had admitted, that he was not qualified to try the case. The said Heatherly, sheriff, was sworn on behalf of the State, and admitted he had made a bet on the verdict of the jury, but that he did not have charge of said jury nor speak to them nor was in their presence, after he had made said bet.

The court overruled the motion for a new trial based on said affidavit. The defendant then filed a second affidavit, and on the grounds therein set forth moved for a new trial, which motion was overruled. This second affidavit seems to contain nothing pertinent to the case and is ignored in the brief for the defendant, the plaintiff in error. In said affidavit it is stated, that since the trial, affiant had discovered that John O'Neal, one of the jurors, had before he was sworn stated he was opposed to *Red Men*, and that if he were ever on a jury to try one, he would send him to the penitentiary or hang him, and that all through the trial affiant was accused of being a *Red Man*.

To the judgment on the verdict the defendant obtained a writ of error.

It is here insisted, that as the indictment was bad as an indictment for robbery, it was also bad for an assault and should have been quashed. In the case of *Hardy and Curry* v. *Commonwealth*, 17 Grat. 592, the indictment was for robbery. It charged that the prisoner "did make an assault" upon one G., and one gold watch, &c., from the person and against the will of G., &c., "feloniously and violently did steal," &c. The jury acquitted the prisoners of the felony charged but found them guilty of "assault and battery." On motion in arrest of judgment the finding was held valid. This was held admissible under ch. 208, sec. 27 of the Code. The same provision is in sec. 18 of ch. 159 of our Code, and is as follows: "If a person indicted of felony be by a jury acquitted of part and convicted of part of the offence charged, he shall be sen-

tenced for such part as he is convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor." To the same effect is *Canada's Case*, 22 Grat. 905. If the offence, of which the prisoner was found guilty by the jury, were included in the greater offence, for which the party was indicted, he was properly convicted on that indictment of the lesser offence.

In both the above cited cases the indictment for the greater offence was good; here it is clearly bad for the higher crime. Can a party be convicted on a bad indictment for robbery of an assault, which is substantially charged in such indictment? This question we believe has never been decided in Virginia or this State.

In *Commonwealth* v. *Blaney*, 133 Mass. 571, the indictment charged that the defendant "with force and arms with malicious intent one A. then and there to maim and disfigure in and upon the said A. feloniously did make an assault," and that he, "a portion of the nose of the said A. then and there feloniously and maliciously did bite off." It was held, that this was a good indictment for assault and battery, and that a motion to quash the indictment, on the ground that it does not properly set forth the offence described in the statute, and a motion that the defendant be allowed to plead specially to the charge of assault and battery were properly overruled. Devens, Judge, said. "Assuming that the aggravation was not well charged, yet the indictment contained every element of a formal and substantial charge of assault and battery. It was not therefore defective by reason of failing to charge the defendant in due form with any offence. It could not have been quashed on motion nor adjudged bad on demurrer." It is further said, "for similar reasons the defendant was not entitled as he desired to plead specially to the charge of assault and battery. He could, when judgment was to be rendered and sentence imposed, object to any sentence except for that crime and was entitled there to be heard on that subject.

In *Madame Restell's Case*, 1 Com. 379, it was held that mere surplusage in an indictment will not vitiate it, and therefore, where an indictment alleges facts, which constitute a misdemeanor, it will be good for that offence, although it states other facts, which go to constitute a felony, provided

all the facts alleged fall short of the charge of felony, in consequence of some other fact essential to that charge, *e. g.*, the intent of the party accused, not being averred. By statute in New York it was a misdemeanor to administer drugs, &c. to a pregnant female *with intent to produce a miscarriage*, and by another statute it was manslaughter to use the same means *with intent to destroy the child*, in case the death of such child be thereby produced. An indictment charged all the facts necessary to constitute the crime of manslaughter except the intent, with which the acts were done, and in its conclusion it characterized the crime as manslaughter; but the only intent charged was an *intent to produce a miscarriage*. It was held that the indictment was fatally defective for the felony but good for the misdemeanor, and that the accused was properly convicted of the latter offence.

The indictment here, while it falls short of charging the crime of robbery, clearly charges an assault, for which the defendant was convicted, and the defendant certainly has no right to complain, because he was not legally charged with the crime of robbery as well as for the assault, which would necessarily precede that crime. If the indictment properly charges an assault, the surplusage contained in the indictment by reason of an unsuccessful attempt to charge the higher crime will not vitiate it for the lesser one, which is well charged.

As it might be under sec. 14 of ch. 152 of the Code, a question not here decided, that the defendant could plead an acquittal of the higher offence under a fatally defective indictment for such offence in bar of a good indictment for the same offence, the attorney for the state should be exceedingly careful not to go to trial on such defective indictments, unless he thinks the accused is not guilty of the felony.

The court properly refused to quash the indictment, as it was good as an indictment for an assault. And the indictment being a good indictment for the misdemeanor, of which the defendant was found guilty, the court properly refused to arrest judgment.

It is assigned as error, that the court refused to set aside the verdict, on the ground that the jurors, Moran and Upton, had formed and expressed an opinion upon the guilt or

innocence of the accused, before they were sworn on the jury, and that as to the juror Moran the knowledge thereof did not come to defendant until after the trial. Of course no ground whatever is alleged to show, that the verdict should be set aside, because Upton was not a qualified juror, as the affidavit does not state, that the defendant had no knowledge of his bias before the trial, although it states that Upton after the trial had stated, that "he was not qualified to try said cause," but for what reason is not stated. He could not be heard to impeach his own verdict. It is the settled law in this State in both civil and criminal trials, that the verdict of a jury will not be set aside for objections to jurors on grounds, which existed, before they were sworn, unless it appears, that by reason of the existence of such grounds the party objecting has suffered wrong or injustice; and the ignorance of the party complaining of such grounds in such case until after verdict is immaterial. (*Flesher* v. *Hale*, 22 W. Va. 44.) This disposes of the objections to both of said jurors; for in neither case is it shown, what the character of the objection to the jurors was, whether either of them had expressed merely a casual opinion, or whether they had prejudged the case.

Even in a murder case a new trial will not be granted for matter that was a principal cause of challenge to a juror, which existed before he was elected and sworn, but which was unknown to the prisoner until after the verdict, and which could not have been discovered by the exercise of ordinary diligence, unless it appears, that the prisoner suffered injustice fron the fact that such juror served upon the case; and that could only be shown in such case by evidence sufficient to show, that such juror had prejudged the case. *Greer's Case*, 22 W. Va. 800. Certainly no less stringent rule would be adopted in a misdemeanor or civil case. There is no such evidence in this case.

It is also assigned as error, that the court refused to set aside the verdict on the ground that the sheriff, who had charge of the jury, made a bet, while the jury were considering the case, that the verdict would be against the defendant. Speaking for myself I have no hesitation in saying, that, if this were a felony case, and the sheriff, who had charge

of the jury, had made a bet with any one, while he had the jury so in his charge, that the jury would find the prisoner guilty, this fact would raise a presumption, that the prisoner was prejudiced thereby, and the burden would be thrown upon the State of showing, that the prisoner could not have been prejudiced by such conduct of the officer having the jury in charge. I think this would be the logical result of the principles this Court has already laid down in *Cartright's Case*, 20 W. Va. 32, and *Greer's Case*, 22 W. Va. 800. But this is not a felony but a misdemeanor case. The indictment, we have seen, did not charge felony, but was good as an indictment for a misdemeanor. The jury was therefore not properly in the charge of the sheriff during the trial, and under these circumstances the betting of the sheriff on the result of the trial would be no more than the betting of any one else on the verdict. At the time the bet was made, the jury had been already selected and sworn, and therefore the sheriff after the bet had nothing to do with the selection. What effect such betting would have had on the verdict, if made before the jury were sworn, and if the sheriff had anything to do with the selection of the jury, does not arise in this case.

There was nothing in the second motion for a new trial, as there is no evidence in the case that defendant was a "Red Man."

There is no error in the judgment of the circuit court, and it is therefore affirmed.

AFFIRMED.

WHEELING.

STATE v. FLANAGAN.

Submitted June 13, 1885.—Decided June 27, 1885.

1. An indictment for murder in the form prescribed by sec. 1 of ch. 118 of the Acts of the legislature of 1882 is a valid indictment. (p. 118.)

2. Upon a writ of error to a judgment overruling a motion to set aside a verdict and to award a new trial, on the ground that the verdict was contrary to the evidence, and the evidence and not the facts proved is certified in the bill of exceptions, the appellate court will not reverse the judgment, unless after rejecting all the conflicting parol evidence of the exceptor and giving full faith and credit to that of the adverse party the decision of the trial-court still appears to be wrong. (See *Black* v. *Thomas*, 21 W. Va. 709.) (p. 119.)

3. If a party be accused of crime and a conviction is sought upon evidence in whole or in part circumstantial, it is essential, that all the circumstances, from which the conclusion is to be drawn, and without which it could not be drawn, shall be established by full proof, and every circumstance essential to the conclusion must be proved in the same manner and to the same extent, as if the whole issue had rested upon the proof of each individual and essential circumstance. (p. 122 & 136.)

4. All such essential facts and circumstances, when established by full proof, must be consistent with the hypothesis of the guilt of the accused, and inconsistent with any other hypothesis; and it is essential, that all such facts and circumstances should be of a conclusive nature and tendency. (p. 122.)

5. If any of these essential circumstances be consistent with the hypothesis of the innocence of the accused, then that circumstance ought not to have any influence in establishing the main fact to be proved. (p. 136.)

6. It is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the *corpus delicti* either by direct evidence or by cogent and irresistible grounds of presumption. (p. 123.)

7. On the trial of an indictment for homicide, although the body has been found, yet the *corpus delicti* can not be said to be proved, until it be established by full proof, that such death has not been caused by natural causes or accident. (p. 123.)

8. On the trial of such indictment when the remains of the alleged deceased have been found wholly or partly consumed by fire, it is necessary to establish by full proof, that the remains so found are the remains of the deceased, and this proof is a necessary part of the *corpus delicti*. (p. 133.)

9. On a trial for homicide, where the evidence is insufficient to establish the *corpus delicti*, there is no sufficient proof that a legal crime has been committed, and therefore no person can be legally guilty of the commission of it. (p. 123.)

The facts of the case are sufficiently stated in the opinion of the Court.

A. B. Parsons and *T. A. Bradford* for plaintiff in error.

Alfred Caldwell, Attorney General, and *C. H. Scott* for the State.

WOODS, JUDGE:

On May 23, 1884, John C. Flanagan was indicted in the circuit court of Randolph county for the murder of Frances Summerfield, on the — day of December, 1883.

The indictment was in the form prescribed by sec. 1 of ch. 118 of the Acts of the Legislature of 1882. To this indictment the defendant pleaded "Not guilty." The case was continued until the September term, when it was tried, and the jury on September 27, 1884, returned their verdict finding him guilty of murder in the first degree, and that he be punished by confinement in the penitentiary.

The defendant moved the court to set the verdict aside and grant him a new trial, on the ground that the verdict was contrary to the evidence, which motion the court overruled, and the prisoner excepted, and filed his bill of exceptions, wherein the court certified all the evidence which was before the jury on the trial, and entered a judgment upon the verdict, that the prisoner be confined in the penitentiary, during the period of his natural life. To this judgment the prisoner obtained a writ of error.

Four grounds of error are assigned by the prisoner's counsel, but all taken together, they amount in substance to this, that the verdict was not supported by the evidence. One of the prisoner's counsel suggests in his brief, that the indictment was insufficient, because it did not "fully and plainly inform the prisoner of the character and cause of the accusation against him." This question has been twice before this Court, and in both cases it has been held that an indictment in the form prescribed in sec. 1 of ch. 118 of the Acts of the Legislature of 1882 is sufficient, and we regard this as a settled question. *Schnelle* v. *State*, 24 W. Va. 767; *Smith* v. *State*, *Id.* 814.

The only remaining question is that presented by the pris-

oner's bill of exceptions, viz: Is the evidence sufficient to sustain the verdict? It is evident upon inspection of the bill of exceptions, that while it purports to certify the *facts* proved, it amounts to nothing more than a certificate of the evidence given by the several witnesses at the trial. Whatever doubts may have heretofore existed as to the sufficiency of a bill of exceptions, which certifies all the evidence adduced at the trial instead of the facts proved thereby, it is now well settled that the appellate court, upon a bill of exceptions certifying all the evidence, will review the opinion of the trial-court in granting or refusing a new trial, on the ground that the verdict is contrary to the evidence, in all cases where it is not compelled to decide upon the degree of credibility to which the witnesses or any of them, were entitled; but that in all cases where the appellate court, in order to grant relief, is required to pass upon the credibility of the witnesses, it will decline to interfere with the verdict which has been approved by the trial-court, for the very good reason, that no certificate of the evidence, of witnesses whose testimony is conflicting, can afford the appellate court an opportunity of judging of the credibility of the witness, equal to that possessed by the court and jury which tried the cause. The testimony given by two witnesses when reduced to writing, may seem equally truthful, yet the conduct and demeanor of one of these witnesses before the jury may have convinced both court and jury that the witness was wholly unworthy of credit, while that of the other, may have carried conviction to the mind of every one who heard his testimony. In all cases therefore where the appellate court is asked to determine the degree of credibility, to which the witnesses are entitled, it will decline, because it is unable to do so. But in cases where the evidence, and not the facts, is certified, the appellate court will review the opinion of the trial-court granting or refusing a new trial on the ground that the verdict is contrary to the evidence, whenever the court by excluding all the conflicting parol evidence of the exceptor, and by giving full faith and credit to all the evidence of the adverse party can see that the verdict is plainly contrary to, and unsupported by the evidence. *Carrington* v. *Bennett*, 1 Leigh 310; *Ewing* v. *Ewing*, 2 Leigh

337; *Green* v. *Ashby*, 6 Leigh 135; *Rohr* v. *Davis*, 9 Leigh 30; *Slaughter's Administrator* v. *Tutt*, 12 Leigh 147; *Parly* v. *English*, 5 Grat. 141; *Vaiden* v. *Commonwealth*, 12 Grat. 717. This question has been considered by this Court in the cases of *Smith* v. *Townsend*, 21 W. Va. 486, *Black* v. *Thomas*, *Id.* 709, and *State* v. *Thompson*, *Id.* 741. In the case last cited this Court laid down the rule in such cases to be, that, "where the evidence and not the facts is certified in the bill of exceptions, the appellate court will not reverse the judgment unless after rejecting all the conflicting parol evidence of the exceptor, and giving full faith and credit to that of the adverse party the decision of the trial-court still appears to be wrong." But the appellate court will not interfere with the verdict of the jury, on the ground that it is contrary to the evidence, merely because, if upon the jury it would, upon the evidence, have given a different verdict. To justify the court in granting a new trial, the evidence should be plainly insufficient to warrant the finding of the jury. *Grayson's Case*, 6 Grat. 712, and *Vaiden's Case*, *supra*. Applying these rules to the case under consideration, all evidence introduced by the prisoner, which is in conflict with that offered by the State must be disregarded. If therefore upon giving full faith and credit to all the evidence introduced by the State, and disregarding all evidence in conflict therewith, offered by the prisoner, the same was plainly insufficient to warrant the verdict, the judgment of the circuit court overruling his motion to set the same aside, must be reversed, otherwise, it must be affirmed.

All the evidence introduced by the State against the prisoner was circumstantial; and it is insisted by the Attorney General in argument, that the circumstances set forth in the bill of exceptions, are not only sufficient to establish the *corpus delicti*, but to fix upon the prisoner the crime of murder, and that he was induced to commit the crime "by a jealous woman who felt outraged by the conduct of her husband." It may be remarked here, that where a crime has been committed, and the accused has been proved either by direct or circumstantial evidence to be the guilty party, it becomes wholly immaterial to inquire what motive induced him to commit the crime; but when the perpetrator is unknown,

and an effort is made to fasten upon the accused the guilt of the crime, then the motive, which may probably have induced him to commit the crime, may become a matter of the most earnest inquiry, for if the alleged motive be such as usually leads to the commission of such a crime, proof of its existence in the mind of the accused before or at the time of the commission thereof may possibly in some degree, tend to connect the accused with it. But if on the other hand, there is a total absence of all motive to commit such a crime, or if a motive of a wholly different character is shown to have existed in the mind of the accused, these facts would tend to relieve the accused from the charge preferred against him. If one was found murdered, between whom and the accused a deadly feud had previously existed, and the destruction of the deceased would remove a hated and dangerous foe; or if the deceased was one from whose death great profit might accrue to the accused, and he was discovered under such circumstances, as gave him safe opportunity to commit such crime, a motive therefor might be found in the existence of such feud, or in the hope of such gains, tending to fix upon him strong suspicion of guilt; but if the deceased was the wife, or child, or the intimate friend of the accused, between whom and the accused none but the most friendly relations had ever existed; or if the deceased was one upon the continuance of whose life depended the welfare or happiness of the accused, and he was discovered under similar circumstances, the absence of all motive to destroy, or the existence of the motive to preserve the life of the deceased, would as strongly tend to relieve him from all suspicion of guilt. It is not to be denied that circumstantial evidence may afford the strongest possible proof of guilt, but in order to do this, the several circumstances relied on to connect the accused with the commission of the offence must be established by full proof, and they must each be of a conclusive nature and tendency, consistent with each other, with the hypothesis of his guilt, and inconsistent with that of his innocence.

In every criminal case the guilt of the accused must be established by full proof, that is, by evidence which satisfies the mind of the jury to the exclusion of every reasonable

doubt, and "neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose unless it generate full belief of the fact to the exclusion of any reasonable doubt." 1 Stark. Ev. 478; 3 Greenl. Ev. sec. 29. As guides to the safe administration of justice in criminal cases where the guilt of the accused is to be ascertained and determined upon circumstantial evidence, courts and text-writers have laid down the following rules, which meet with our approval. "First. It is essential that all the circumstances from which the conclusion is to be drawn shall be established by full proof, and the party upon whom the burden of proof rests, is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as it the whole issue had rested upon the proof of each individual and essential circumstance."

"Second. All the facts and circumstances, when established by full proof must be consistent with the hypothesis of the guilt of the accused."

"Third. It is essential that the circumstances should be of a conclusive nature and tendency. Evidence is always indefinite and inconclusive when it raises no more than a limited probability in favor of the fact, as compared with some definite probability against it, whether the precise proposition can, or can not be ascertained. It is, on the other hand, of a conclusive nature and tendency, when the probability in favor of the hypothesis exceeds all limits of an arithmetical or moral nature. Such evidence is always insufficient where assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis, which invests mere circumstances with the force of proof. Whenever therefore the evidence leaves it indifferent which of sveral hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence can not amount to proof, however great the probability may be."

"Fourth. It is essential that the circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved." 1 Stark. Ev. 507–513, and 3 Greenl. *supra*; *Commonwealth* v. *Webster*, 5 Cush. 295. From these,

another rule results in criminal cases:—that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, amounts to nothing unless the *corpus delicti*, the *fact that the crime* has been actually perpetrated, be established by full proof,—for so long as the least reasonable doubt exists as to the *act*, there can be no certainty as to the agent.

It is a fundamental and inflexible rule of legal procedure, of unusual obligation, that no person shall be required to answer, or be involved in the consequences of guilt, without satisfactory proof of the *corpus delicti*, either by direct evidence or by cogent and irresistable grounds of presumption, for where there is no sufficient legal proof of crime, there can be no legal criminality. *Rex* v. *Burdett*, 4 B. & Ald. 123, Wills Cir. Ev. ch. 7, sec. 1. This principle requires that upon a charge of homicide even when the body has been found, and although indications of a violent death be manifest, it shall still be fully and satisfactorily proved, that the death was neither occasioned by natural causes, by accident, nor by the act of the deceased himself. 1 Stark Ev. 513.

While the discovery of the body necessarily affords the best evidence of the fact of the death, and the identity of the individual, and most frequently also, the cause of the death, yet in such cases the *corpus delicti* can not be said to be proved until it be fully and satisfactorily proved that such death was not caused by natural causes, accident, or by the act of the deceased. Wills Cir. Ev. p. 207; 3 Greenl. Ev. sec. 30; 1 Stark. Ev. 573.

The prisoner at the bar, John C. Flanagan is charged with the wilful murder of Frances Summerfield. This charge divides itself into two principal questions, to be resolved by the proof: First, whether Frances Summerfield came to her death by an act of violence inflicted by any person; and secondly, if she did, whether that act was committed by the accused? Under the first head we are to enquire and ascertain from the evidence in this record, whether Frances Summerfield is actually dead; and if so, whether the evidence is such, as to exclude beyond reasonable doubt the supposition, that her death was occasioned by accident or suicide, and to show that it must have been the result of an act of violence,

To resolve these questions let us examine the evidence set forth in the prisoner's bill of exceptions. It will be unnecessary to recite all the evidence offered on the part of the State, and from the rule we have laid down we are compelled to reject all the evidence offered by the prisoner which conflicts with that offered by the State. Giving full faith and credit to the evidence offered by the State, it appears that Frances Summerfield, a single woman, who had never been married, before and on the 16th of December 1883, with her illigitimate child then about two years of age, was living on the farm, and in a house belonging to Job H. Parsons, on the east side of the top of Rich Mountain, about three hundred yards from the public road, and about one mile from his residence which was on the west side of the top of said mountain; that the house in which she lived was a log house, about sixteen or eighteen feet square, built two or three years before that date, with one door and one window, the door on the north, the window on the south side, and a chimney built of rock at the west end of the house; that three of the State's witnesses testified that the chimney was *about as high* as the house; another that it was not as high as the house, and another, that it was an *old chimney to which the honse had been built;* that on Thursday, December 13, the prisoner had been at the house of the State's witness David B. Wyatt surveying; that on the next day he again came to his house, and left about one o'clock, P. M. of that day, having borrowed said witness's gum coat, as it was raining, and wore it to the house of said Parsons where he stayed all night, and all the next day, mending his children's shoes and feeding his stock, until four or five o'clock in the evening, when he left the house, and some time after dark on the same evening, went to the house of Frances Summerfield with whom he spent the night, leaving her house about three o'clock on Sunday morning, December 16, 1883, and went in the direction of his home, which by the shortest route was eleven miles distant from her house, and by the route he said he traveled, it was seventeen or eighteen miles; that he reached his home about the first "chicken crow" on Monday morning, December 17, 1883, and remained there until he attended the coronor's inquest on the following Sunday, when he was arrested and committed to jail; that Frances

Summerfield and her child spent nearly all day of Sunday December 16, 1883, at the house of her cousin Aaron White, who lived about one quarter of a mile from her house, and left late in the evening, but afterwards returned to get fire; that on Monday morning December 17, 1883, said White arose *two or three hours before day*, looked east and west and it was very light; it was snowing and blowing, could see things all around it was so light; his wife got up and saw the light; it was so bright she could see fences, and bushes, and the bulk of the stable that stood near the burnt house, but could not see the house on account of a little ridge; his wife thought it a light in the sky; said to her husband, "Can it be possible that it is Frances Summerfield's house?" and he said "no, as they could see no sparks or smoke;" that on Sunday, December 16, the State's witness Ray, was returning from Pendleton county, with the wagon and team of Parson and a load of corn for him; came up the east side of Rich Mountain, and was overtaken by nightfall, just opposite the house of Frances Summerfield, where he turned out and fed his horses, except the one ridden by himself, and another which was ridden away by the witness Lambert who lived with said Parsons and who had come to meet the load of corn, and he left the wagon in the road; that after Lambert left, Ray rode up to the house of Frances Summerfield, and asked to stay all night with her, and she refused; that he heard a child crying in the house, and after feeding the stock below the house, returned by the house, he saw a light through the window, he then went to his own house, about a mile north of the residence of Parsons; that early on Monday morning December 17, 1883 he returned for the wagon load of grain left the evening before, by way of Parsons' house. Saw Lambert there, and traveled the public road to the place he had left the wagon, but saw no tracks except one horse track made by one of his team horses that had come over in the night; considerable snow had fallen in the night; that when the wagon was left on Sunday night the snow was three or four inches deep, and on Monday morning the snow was at least a foot deep, and tracks made by the loaded team the night before were completely obliterated; but if tracks had been made after twelve o'clock on Sunday night, they would

not have been more than "half snowed up," if made before that they would have been entirely "snowed up." It further appears that the fact that the house of Frances Summerfield was burnt, was first discovered about eight o'clock on Tuesday morning, December 18, 1883, by Noah Jordan and John Summerfield both of whom were examined on the part of the State. The material part of the testimony of Jordan is, that about eight o'clock in the morning of December 18, 1883, he and John Summerfield started on foot to Collett's store, and to go a near way, they went by the place where Frances Summerfield's house had stood. When they got near the place they discovered that it was burnt down, nothing remaining but the naked chimney; that they saw in the ashes of said house the burnt remains of a small person whom they thought was said Frances Summerfield, about three feet from the hearth, her head lying toward the window; that he took hold of a leg and it broke off about the knee; that he saw her head and teeth, and he took hold of her head and it fell to pieces; that the bed stood twelve or fifteen feet from the fireplace in one corner of the house; the lock lay about three feet from the door when it was shut, and the bolt was out as if it had been locked, and a crow-bar was lying a little back from the middle of the house; the hinges lay immediately below where they had been screwed to the door and the facing, and they were closed up, as they would be when the door was shut; that witness and John Summerfield were the *first persons* that were at the spot after the house was burnt, and although there was a deep snow on the ground, there were no tracks or indications that any person had been there before them; that after leaving the burnt house about two hundred yards, he saw depressions in the snow a little way at a time, but he could not tell, whether they were low places in the ground or the tracks of man or beast. John Summerfield, who was with the witness Jordan when the burnt house was first discovered, testifies that he and Jordan were the first persons at the burnt house; that he saw the remains of a person lying on the right side, left arm extended; the skull was whole except from the eyes up, it seemed to be broken or burned up; a crow-bar lay about the middle of the house; the lock lay about three feet from the door; that neither

witness nor Jordan picked up the lock; did not at that time see the remains of the child; saw no tracks of anything about the house place; that as he passed up the path towards the top of Rich mountain after they got into the woods, they saw "dents" in the snow; could see them on up to the public road in places only, but could not tell what they were; the snow was nearly knee deep; witness was the first to discover the remains of the dead child; they were found where they said the bed had stood; that the fore part of the child's head seemed to be broken up while the hinder part of the head seemed to be whole; and that a pot lid lay near the remains.

Lafayette Elza, another witness for the State testified, that he was at the inquest, saw the burnt remains of the woman; saw some dry blood in one side of her heart, and in both sides of the child's heart; there was no flesh upon or about the remains of the woman; all was consumed by fire except the heart, the liver and "the lights," some portions of the entrals, and what appeared to be some roasted flesh about the chest, as though the person had had a breast or breasts; the remains of the child were entirely consumed; the front part of its head seemed to have been broken in. He further testified that on December 3, 1883, he helped Job W. Parsons butcher a sheep at Frances Summerfield's; that witness got one quarter of it, and the remainder he salted in a trough and put it on the loft, and placed the *crowbar under the side* of it to keep it from turning over, and after the house was burned the crowbar lay about two or three feet from where it would have laid had it fallen perpendicularly down; that witness was one of the guards that conducted the prisoner from the inquest to the jail at Beverley, that on the way there, they stopped at the house of David B. Wyatt for prisoner to write a letter home; that while there he heard prisoner say, that "it he had to suffer, others would have to suffer with him." Witness did not hear all the conversation, but they were talking on the charge against the prisoner. Another witness heard the prisoner at the inquest say, that he wanted his father and brother Eben sent for; that they would satisfy the jury that he had stayed all night on Sunday night at his brother Eben's; that prisoner seemed to think he was ac-

cused—and said: "If this charge caused him trouble others would see trouble with him;" that witness could *not tell exactly* how it was said, but it was *about* that way; that every one was trying to find out who knew anything about the burning; the prisoner said a good deal there but witness can not remember all he said. Another witness for the State testified that he was the constable, who summoned the prisoner as a witness to attend the inquest; that prisoner attended the inquest, that after the inquest was over, he took the prisoner to jail at Beverley; that on the way to Beverley prisoner said that "it seemed his best friends had turned their backs on him; that some of them had sworn wrong against him; that if he had to suffer innocently, things would be revealed that would make people open their eyes;" that at the time witness summoned the prisoner to attend the inquest as a witness, he had in his pocket a warrant for his arrest, but he did not inform him of it; that he summoned the prisoner as such witness on Friday after the burning.

The State's witness Lambert, who lived with Job W. Parsons, who had gone out on Sunday evening, December 16, 1883, to meet Ray with the load of corn, further testified on behalf the State, that after he had left Ray and the wagon in the road, as he passed up Rich mountain on his way to said Parsons, while on the east side of the top of the mountain, about three hundred yards from the top, and fifteen or twenty steps below the path that led down to Frances Summerfields, he met a man dressed in dark clothes, with a dark overcoat and a *medium sized hat*, whom he took for the defendant, John C. Flannegan; that he bid him the time of night and the man did the same; that he had seen the prisoner three times before; that Sunday night was snowy and there was no moon, but the snow gave some light; that he was not well acquainted with the prisoner, knew him when he saw him, that he recognized him by the sound of his voice; witness admitted that at the inquest over the remains, he swore, that from his partial acquaintance with Flanagan, he could not recognize his voice, but when Flanagan came to the inquest, and said "Good morning, gentlemen," he *thought it like the voice* he had heard on the mountain that Sunday evening; and that he never took any thought about his voice until he came to the inquest.

Emma Schmithey, another witness on behalf of the State, testified that she was living at Job W. Parsons in December, 1883; that on Saturday, December, 15, 1883, the prisoner was at Parson's mending shoes, and left there that evening. He was there on the preceding Thursday. He wanted paper. Mrs. Parsons gave him some. She *thinks* she saw the prisoner there on Sunday afternoon following, in the kitchen, and he went from the kitchen into Mrs. Parson's room; he did not stay very long as I saw, *if he was there at all.* Mrs. Parsons was in the room all the afternoon, except that she was out three or four times; that she was also out of her room several times during the forenoon, and she came in one time and sat close to the fire and said she was almost frozen; that witness was in Mrs. Parsons' room with Miss Knutti and the children reading to them; that there was no fires in the house except in Mrs. Parsons' room, and in the stove; Mrs. Parsons built a fire in the stove to get dinner and told witness to read to the children; that the witness was then *twelve* years old. Mrs. Parsons is post-mistress; the mail comes and goes each way twice a week; that witness *cannot say for certain* that the prisoner was at Parsons' on Sunday evening, but *thinks he was;* that she *just thinks* prisoner was *there on Sunday* and she cannot tell *why she thinks so.*

Emanuel White and A. S. Rogers were also examined by the State. White testified that last fall (1883) the prisoner told him, at David P. Wyatts, that he heard that Mrs. Job W. Parsons had said, that she would give $50.00 to see Job W. Parsons and Frances Summerfield together, and if he knew the money was sure, she could see them together; and witness further stated that he had heard the same rumor about the $50.00. Said Rogers testified that one or two weeks before the Summerfield house was reported burnt, he met the prisoner in the public road at Red Creek; that he did not recognize the prisoner until he told him who he was; that they traveled together on horse-back about four miles and talked about the war and other matters; that prisoner said there were many loose women on Dry Fork, and that Frances Summerfield was one of that kind, and it was a shame that Job W. Parsons was keeping her on his place

because he had a nice woman for a wife, and if the thing was not stopped, something like the "Red Creek affair" would likely happen again; that witness understood the "Red Creek affair" was the burning up of some persons years ago; that witness had seen prisoner and talked to him but once before, and that was two months before that time.

Eben. Flanagan, the brother of the prisoner, examined as a witness for the State testified, that the prisoner came to his house on Monday morning, December 17, 1883, about seven o'clock and borrowed some meal; that he was there again on Wednesday following in the afternoon, and before he went away, made a present to witness of a pistol, for which witness had previously offered him $5.00, and said that he would not sell it to anybody but would give it to witness, who told the prisoner that he would give him something for it, but prisoner said, "No, I may want a favor of you some time." Witness asked prisoner for a chew of tobacco and he gave him a piece and told him to keep it; that he saw the prisoner again on the next Friday at his own house, and he said to witness: "Have you heard the news?" Witness replied, "no, what news?" and prisoner then said that the word had come to him through his children from the school-house the evening before, that Fanny Summerfield and child were burnt up, and he supposed it was true because George W. Summerfield's children had brought the word to the school-house the day before; that witness went to chop wood for prisoner, who went away and after a while returned and told him by himself, a short distance from the prisoner's boy, where they were chopping wood, that constable Bennett had just summoned him as a witness to appear before the coroner's jury, and prisoner said, "they would be scouring the country to find out every man's whereabouts, and he told witness that if anybody enquired where he, the prisoner, was on Sunday night December 16, 1883, to tell them he stayed at witness's house on that night and to tell his father and witness's wife, and the prisoner's son, who was staying at witness's house, to tell the same thing if enquired of; that he wanted it understood that he stayed at witness's house that Sunday night;" that prisoner did not stay at witness's house that night; that witness testified before the coroner's jury on Sunday follow-

ing; that he was not allowed to talk to prisoner until Monday; that after witness had so testified and before he talked to prisoner he wrote to witness on a chip, "Did you state at your house on Sunday night?" and motioned for witness to come to him, and as witness passed by prisoner handed him the chip; that witness read it, and prisoner looked at him for an answer, and witness shook his head; that after the jury had rendered their verdict, prisoner took witness and his father around the house of G. W. White where the inquest was held, and remarked to witness: "By your not understanding me I am afraid you have got me in a bad box."

The gum coat borrowed by the prisoner from Wyatt on December 14, 1883 and worn by the prisoner on that day was produced on the trial, and two physicians who had examined it between the 15th of September 1884, and the time of the trial proved there were eight or ten drops of blood upon it, mostly on the right side and sleeve, and some on the left side and sleeve but they could not tell whether it was human blood or not; that they found a light golden colored hair wrapped around one of the buttons of the coat, and hanging down from four to six inches from the button; that the hair was lighter than that of the prisoner; and it was further proved by another witness for the State that Frances Summerfield had light hair, lighter than that of prisoner. Job W. Parsons was twice examined by the State and testified that he left home on Saturday morning December 15, 1883 and was in Grafton on the Monday following; that as he left home Saturday morning he went by Frances Summerfield's house, and stopped there; that the catch on the lock of the door was broken so that the door could only be held shut by locking; that there was a stone hearth to the fire-place about two feet wide; that he had a pistol, a five-shooter small, having a home-made rod to hold the cylinder, which he had found in the road; that the last time he saw it was on April 22, 1883, that he did not know it was gone until July following; that the prisoner came to witness's house late on Friday evening and asked to stay all night, and witness consented; that prisoner had on him a gum coat and he thinks light clothes; that witness does not feel kindly towards prisoner, and had helped to employ counsel to assist the prosecuting

attorney to prosecute him; that he wanted justice dealt out because his house was burnt; that witness had gone twice to see the prisoner's wife in search of evidence for the State since the prisoner was in jail, and had sent a written order by a sister of Frances Summerfield to the prisoner's wife for the gum coat, but did not get it; that he wanted it as an instrument of evidence for the State on the trial. The prisoner introduced various witnesses, who contradicted material portions of the testimony above recited, which under the rule laid down can not be considered. But he also introduced the testimony of other witnesses, showing that the gum coat had remained at prisoner's house until May 6, 1884, when it was taken away, and left at Mrs. Callott's, at Beverly, until September 15, 1884, when it was taken away from her by the sheriff of Randolph county, and left at the office of Dr. Yokum, where it remained until brought into court during the trial. David B. Wyatt who owned the coat testified on behalf of prisoner, that he had owned it for more than two years before he loaned it to the prisoner; had frequently lent it before that time to others, (or as he expressed it, to "Tom, Dick and Harry") until it was about worn out; that he had hunted squirrels and pheasants and killed them with that gum coat on, and carried them in his hand with his arm up over the gun when on his shoulder; that a short time before he lent the coat to prisoner, he lay by a 'coon tree until day light in company with his boy, who shot the 'coon, and that witness undertook to catch it as it fell to keep it out of the fire and from the dogs; that he failed to catch it; the 'coon falling about four feet from him, and the dogs got it and shook it around some time before he could get it away from them; that he either had that gum coat on upon that occasion, or it lay close by the fire near the place where the 'coon fell, and it bled a good deal, but he can not say whether blood got on the coat on these occasions or not. Mrs. Mary J. Parsons, the wife of Job W. Parsons, and Miss Knutti, were also examined as witnesses for the prisoner. Mrs. Parsons testified that the prisoner stayed at her house on Friday night, December 14, 1883, and left there on Saturday evening about four or five o'clock, and never returned, and was not there on Sunday, December 16, 1883; that he

had been mending shoes on Saturday for Miss Knutti and the children; that Mr. Parsons was absent and witness got him to feed the cattle before he left on Saturday evening; that she has been post-mistress for eight or nine years past; that prisoner came to her house on Thursday, December 13, 1883, got some papers, wrote a letter and mailed it in her office. Miss Knutti testified that she was living at Parsons' during the month of December, 1883, and was at Parsons' house all day Saturday and Sunday, December 15 and 16, 1883; that prisoner left Parsons' on Saturday evening, December 15, 1883, about four or five o'clock; that he was not and could not have been at that house on Sunday, December 16, 1883, without her seeing him, for she was in every part of that house on that Sunday; that he was mending shoes on that Saturday evening; and the last time she saw him on that evening, he was in the kitchen, where he got some apples and went away.

Applying to the evidence in this record the rules of law, which are hereinbefore laid down, the necessity and propriety of adhering to them become apparent.

The first great fact to be established in this case, without full proof of which no rightful conviction could be had is, that Frances Summerfield is dead; for a conviction of murder is never allowed to take place until the body has been found or there is equivalent proof of death by circumstantial evidence to that result. The finding of the remains of a dead body, is not equivalent to finding the body of the person alleged to have been murdered, unless the remains be identified by full proof, which may also be supplied by direct or circumstantial evidence; for unless the remains be so identified, the party supposed to be dead may still be alive. Many lamentable instances in the history of judicial proceedings have occurred, where innocent persons have been tried, condemned and executed, for the murder of persons who suddenly disappeared and who afterwards were ascertained to be alive. Sir Matthew Hale on account of these cases says: "I will never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found. 2 Pls. Cr. ch., 39; Wills Circum. Ev. 207. In the case under consideration the jury by their verdict necessarily

found that Frances Summerfield was dead, and that the burnt remains of one of the persons found in the ashes of her burnt dwelling, where she and her child were living the night before, were her remains, and we are of opinion that the jury from all the surrounding circumstances, detailed in this evidence, were fully warranted in finding that Frances Summerfield was dead, and that her burnt remains were found among the ruins of her dwelling. Another important inquiry still remains to be answered: "Did she come to her death by an act of violence inflicted by any person? Does the evidence exclude beyond a reasonable doubt the supposition that her death was occasioned by accident? If it does not, then the *corpus delicti* is not proved, and if not proved, then as we have already seen, however strong and numerous may be the co-incidences of circumstances to indicate guilt, they will avail nothing; for so long as the least reasonable doubt exists, as to the criminal act, there can be no certainty as to the criminal agent. 1 Stark Ev.; 5 Cush. *supra.*

So far from the evidence in this record excluding beyond all reasonable doubt, the supposition that Frances Summerfield came to her death by accident, it seems to us that all the surrounding circumstances indicate that she perished by the accidental burning of her dwelling house, and not by her own voluntary act, or by any act of violence inflicted by any other person. She, with her little child lived alone in a little log house a quarter of a mile from her nearest neighbor—three hundred yards off the public road; the house built to an old chimney, how old, or how long disused before her house was built to it, does not appear; believed to be safe, but not reaching higher than the roof, perhaps not as high as the comb of the roof by two feet; the house small, heated by one fireplace warming the whole house; the weather cold and stormy, no fire in it until late in the evening, then doubtless a large fire; having had the prisoner with her all the night before, until three o'clock Sunday morning, she doubtless slept soundly; the door locked, as shown by its condition, and the condition of the hinges of the door when the ruins were first discovered; snow three or four inches deep on Sunday evening; a foot deep on Monday morning, most of which had fallen before midnight on Sunday night,

and no tracks of man or beast, about or near the burnt house, on Tuesday morning, at eight o'clock when Jordan and Summerfield first saw them; all these facts tend to make it probable, nay almost certain, that her house had accidentally caught fire from the chimney, or from burning logs or embers rolling over the narrow hearth, and that awakened from her sleep she perished in the ruins of her blazing dwellling, either by being smothered by the flames or caught by the falling loft or rafters; or in the terror of the moment she may have even become so bewildered as to be unable to reach or unlock the door, and perished in the vain effort to reach the window. No sign of violence upon her remains was discovered, all were consumed except the heart, liver, lungs and a part of the entrails; the bones were burnt to cinders, the leg bone broke off about the knee, when lifted up, the skull was whole, except from the eyes up, it seemed broken up, or burned up, and when witness Jordon took hold of the head it fell to pieces; the presence of the crowbar, which was suggested in argument as the instrument with which the murder was committed, and which was found near the middle of house, is fully accounted for by the witness Elza, who on December 3, 1883 placed it under the trough, in which he had salted three quarters of a sheep, butchered there on that day, and which lay in the ruins within two or three feet from where it would lie, if it had fallen perpendicularly down, from where he then placed it. So far as this evidence shows, nothing that the prisoner ever had or owned, or that any other person ever had or owned, was found on or near the burnt premises—nor was anything ever had or owned by the deceased found on or near the prisoner or any other person. The precise time when this house was bunrt is not known, as it was not discovered until Tuesday morning December 18, 1883 about eight o'clock. The evidence however, of Aaron White and his wife would indicate that the the house was in flames on Monday morning December 17, 1883, two or three hours before day, which at that day of the month was between four and five o'clock in the morning.

Considering all these circumstances, and giving full faith and credit to the State's witnesses, we are of opinion they are insufficient to exclude the supposition that Frances Sum-

merfield perished by the accidental burning of her dwelling, and that they are insufficient to prove that she came to her death by any act of violence from the prisoner or any other person.

Nor is the force of this testimony in any degree strengthened by the other circumstances detailed by the State's witnesses, which were introduced for the purpose of connecting the prisoner with the alleged murder.

These circumstances, are—the presence of the prisoner at the house of Job W. Parsons on Sunday afternoon of the 16 of December, 1883; of being seen by the witness Lambert, on his way home that Sunday night from the place where the wagon load of corn was left in the road; the conversation had with the prisoner in the fall of 1883, by the witness Emanuel White, about the rumor in regard to the $50.00—; the conversation had with the prisoner by the witness Rogers; the blood and the hair on the gum coat; the statements of the prisoner at and after the inquest, "that if he had to suffer others would have to suffer with him," &c.; and the effort made by the prisoner to falsely make it appear that he had stayed at his brother Eben Flanagan's house on that Sunday night. All these circumstances are relied upon by the prosecution as sufficient to connect the prisoner with the alleged murder. Now if any one, or all of these circumstances be essential for that purpose, then it follows, that every such essential circumstance, must be proved in the same manner and to the same extent as if the whole issue had rested upon proof of that particular circumstance.

In *Commonwealth* v. *Webster*, 5 Cush. *supra.*, Shaw, C. J. delivering the opinion of the court, says, that "the several circumstances upon which the conclusion depends must be fully established by proof." They are facts from which the main fact is to be inferred, and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one itself were the main fact in issue. Under this rule every circumstance relied upon as material is to be brought to the test of strict proof. 1st Stark. Ev. 510. If any of the essential circumstances, the proof of which is necessary to establish the guilt of the accused, is con-

sistent with the hypothesis of his innocence, then that circumstance ought not to have any influence in establishing the main fact to be proved. 3rd Greenl. Ev. sec. 29, note 2; *Summers* v. *The State*, 5 Blackf. 579.

Whether the prisoner was at the house of Job W. Parsons on the Sunday afternoon of December 16, as testified to by the witness, Emma Schmithey; or was in the that neighborhood on that Sunday evening, as testified by the witness Lambert, is involved in doubt and uncertainty, and their testimony is so greatly weakened when taken in connection with that of the witness Mrs. Parsons and Miss Knutti, that if we had been on the jury we might not have been able to concur in their verdict, which necessarily found that the prisoner was seen on that Sunday by one or both of said witnesses. But the jury have passed on this question, and according to the rules we have laid down, we can not say that the jury were not justified in so finding, for they necessarily passed upon the credibility of these witnesses, which we are unable to do, without invading the province of the jury. The conversation of the prisoner with Emanuel White, as well as that with A. L. Rogers, were introduced by the prosecution for the purpose of furnishing some probable ground of attributing to the prisoner some motive, which might have moved the prisoner to destroy the deceased. The motive suggested in the argument of the Attorney General, is that "he was induced to commit this crime by a jealous woman, who felt outraged by the conduct of her husband." This suggestion assumes that the husband and wife are guilty of gross crimes, of which they were never accused, and of which this record fails to furnish a single scintilla of proof. It discloses no such misconduct or even a suspicion of such conduct against Job W. Parsons, and no such jealousy, or cause of jealousy on the part of the wife; no fact tending to show such misconduct of the husband or jealousy of the wife, is disclosed by this record, and the assumption that such cause existed is wholly unsupported by the testimony. Neither is there any evidence to show that Mrs. Parsons ever mentioned the name of Frances Summerfield to the prisoner, or that the prisoner ever had any unkind feeling towards her. On the contrary according to

the testimony, the prisoner was the one of all others least likely to seek her destruction. The conversation had with White was the repetition of a course rumor, of which the best and purest of women may be the subject in the mouths of the low and vulgar; and this particular rumor, that she had told somebody she would give $50.00 to see her husband and Frances Summerfield together was not sufficient to cast the slightest suspicion upon the fair fame of any respectable woman, much less, to brand her as a murderess. No such shadow of sin falls upon her pathway; and such an idle rumor can not connect the prisoner with such a crime. Neither does the conversation with Rogers in any manner tend to implicate the prisoner in the alleged murder. The fact of having such a conversation with a man whom he had never seen but once before, would rather tend to show, that such a criminal purpose had never entered his mind. If his allusions to the impropriety of Parsons keeping Fanny Summerfield on his farm, were considered by the witness as impugning the purity of P.'s character, it is nevertheless susceptible of a construction entirely consistent with the proprieties of life, for he may have only intended to say that as it was known that Fanny Summerfield was a loose woman, he ought not to permit her to reside on his farm, as it was calculated to annoy his wife. The prisoner did not tell this witness what he meant by another "Red Creek affair," and the "understanding" of the witness can not in any manner tend to convict the prisoner with this alleged crime. Neither of these conversations can have any conclusiveness in their character, as both may be true, and the prisoner free from the slightest suspicion of guilt. The blood on the coat has been accounted for. Who wore the gum coat or how it was used from December 17, 1883, until May 6, 1884, when it was taken to Beverley at Mrs. Collets, or where or how it was kept while at her house from May 6 to September 15, 1884, does not appear, and the circumstance of a hair hanging to a button, can have no significance, as no one has pretended to say, when it was first found there, or whose it was—as a circumstance it has no conclusiveness; there is nothing to connect it with deceased, and its presence is entirely consistent with the hypothesis of the

prisoner's innocence. The same remarks apply with equal force to the statements alleged to have been made by the prisoner, that if he had to suffer, or to suffer innocently, others would suffer, &c. All these statements were made after the prisoner knew he was suspected, and all but one of them after he was in custody. There was nothing said to cause any other person to be suspected, or implicated, no effort to deny that he had been with the deceased, all Saturday night, or when he left, or the route by which he returned home, such statements had no significance when made nor did they acquire any by anything which afterwards occurred. They are perfectly consistent with the hypothesis of his innocence. The only circumstance that could have any criminal significance against the prisoner was in trying to have his brother Eben to tell that he had stayed at his house on Sunday night, December 16, 1883, and to induce his father and son to tell the same, to any person who might enquire where the prisoner had stayed that night, when in fact he had not stayed there. The prisoner at this time was already summoned as a witness to attend the coroner's jury, and the constable at that time had in his pocket a warrant for his arrest; and although the officer did not then inform him of that fact, it is altogether probable he had heard from others, that he was suspected, and would probably be arrested, and he doubtless thought he would escape trouble and expense if he could successfully create the impression that he was at his brother's house that night, and thereby avoid the necessity of telling where he did spend Sunday and Sunday night. No reason is offered by the prisoner for this attempted falsification of fact, except that he said "they would be scouring the country to find every man's whereabouts." He evidently did not want any one to know where he stayed that night. He could have made this plain, but until the State had proved the *corpus delicti*, and other evidence to connect him with the alleged homicide, he was under no greater obligation to show where he was on that Sunday and Sunday night, than was the witness Ray, or Lambert, or any other man in that neighborhood. Wherever he may have been, it is clear from the evidence that he returned to his own house, on Monday morning about "the

first chicken crow." It is equally certain that the house was in flames between four and five o'clock, and that the shortest distance between the burt house and the prisoner's home was eleven miles, and by the path he said he traveled it was seventeen or eighteen miles, by a mountain path with new fallen snow nearly knee deep. The prisoner was on foot, and it would seem under all the circumstances, it would have been impossible to have traveled from the burnt house to his home by the shortest route between the time the house first took fire, and first chicken crow. In the absence of all evidence connecting the prisoner with the alleged homicide, or the burning of the house, and the absence of all motive on the part of the prisoner to do so, and in view of the friendly relations existing between him and Frances Summerfield, we cannot regard the fact, that he endeavored to create the false impression that he stayed with his brother that night, as a circumstance connecting him with the alleged homicide, when it is possible he may merely have desired to conceal from his wife and children, that he had spent that Sunday with some other loose woman on Dry Fork, as he had the Saturday night before with Frances Summerfield. The prisoner's conduct may be entirely consistent with his innocence of the crime alleged against him, and his conduct is not inconsistent with the hypothesis of his innocence.

We are, therefore of opinion, that the evidence in the case under consideration is insufficient to warrant the verdict of the jury, and that the circuit court of Randolph county erred in overruling the prisoner's motion to set aside the verdict and award him a new trial. The judgment of the circuit court is reversed; and the verdict of the jury set aside; and this cause is remanded to the said circuit court for a new trial to be had therein; and to be further proceeded in according to law.

REVERSED. REMANDED.

WHEELING.

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STATE *v.* WILLIAM KINNEY.

Submitted June 17, 1885.—Decided June 27, 1885.

1. To authorize the reversal of a judgment, for the reason that irrelevant evidence has been admitted, the evidence must not only be irrelevant, but it must be of such a nature, that its admission may have prejudiced the prisoner. (p. 143.)

2. When one is charged with crime, any thing he says or does voluntarily, which can have any bearing toward showing his guilt, is competent to go to the jury for what it is worth, of which the jury alone can judge. (p. 144.)

3. Any written statement made by a witness, before he gives his evidence before the jury, which tends to contradict his evidence in any material point, is competent; and, if the court refuse to admit it, the judgment will be reversed, and a new trial granted. (p. 145.)

4. Before such written statement can go to the jury, it must first be shown to the witness, who made it, to give him an opportunity to deny, that it is his, and to give him an opportunity to make any statement he may choose in reference to its execution, and how it was procured, and all the circumstances attending its execution. (p. 145.)

5. If he denies that he executed the paper, or claims, that it did not refer to the matter, on which he had given evidence, or that it was written at the dictation of the prisoner, then it is competent for the prisoner to contradict these statements, and show how and for what the paper was written; and the whole matter, the writing and the evidence with reference to its execution, should go to the jury, if the paper in any view of the case tended to contradict the evidence of the witness. (p. 145.)

The facts of the case sufficiently appear in the opinion of the Court.

Edwin Maxwell, *J. A. Hutchinson* and *John Bassel* for plaintiff in error.

Alfred Caldwell, Attorney General, and *Stuart & Blair* for the State.

JOHNSON, PRESIDENT:

In July, 1883, William Kinney was indicted in the circuit court of Doddridge county for the murder of Bernard Doyle.

The prisoner moved to quash the indictment, which motion was overruled, and he pleaded not guilty.

At the November term, 1883, the issue was tried by a jury. The trial continued several days; and the jury came into the court and answered, they were unable to agree, and were discharged, to which the prisoner made no objection. He was tried in July, 1884, the trial continuing until August 6, 1884, on which day the jury rendered the following verdict:

"We, the jury, find the prisoner, William Kinney (of Israel) guilty of murder in the first degree as against him in the within indictment it is alleged; and we further find that he be punished by confinement in the penitentiary."

Thereupon the prisoner moved to set aside the verdict, on the grounds: First. That it was contrary to the evidence; Second. For erroneous rulings excluding proper and admitting improper evidence; Third. That counsel were permitted to indulge in improper remarks in the concluding argument to the jury.

On August 7, sentence of imprisonment for life was by the court pronounced against the prisoner.

To this judgment and sentence the prisoner obtained a writ of error.

The prisoner saved three bills of exceptions, the first and second to the admission of evidence, and the third to the rejection of certain evidence offered by the prisoner.

There was no exception saved as to the permission of improper remarks in the concluding argument. The evidence or facts proven were not certified. The *first* bill of exceptions shows, that Bernard Doyle was murdered on the night of April 4, 1883, and that one George William Kinney commonly called "Little Bill Kinney" was arrested on the charge of having committed the said murder. And the State having introduced evidence tending to prove, that the prisoner and said George William Kinney, or "Little Bill Kinney" committed said murder; and also evidence tending to show that the prisoner held out inducements to said "Little Bill Kinney" to lay the charge of murder on Alonzo Bee; and further tending to prove that on Monday following April 4, 1883, said "Little Bill Kinney" was in jail in West Union,

Doddridge county, and that the prisoner was not then arrested, or charged with said murder. The State offered a witness, John Kinney, a younger brother of "Little Bill," who proved that he, John Kinney, was in West Union on said Monday and saw the prisoner, who came to witness who was a boy and much lower in stature than the prisoner, and leaning over him, said in a low tone of voice, "Tell your father I want to see him and tell him to come right away." And the State thereupon offered as a witness George Washington Kinney, father of said John and "Little Bill," who proved that John did deliver to him said message sent by the prisoner, and that he went to see the prisoner at his, prisoner's house, but failed to see him he not being at home, that he had no business with the prisoner. The prisoner objected to the testimony of both John Kinney and his father, and moved the court to exclude the same, which motion the court overruled and admitted said evidence, and the prisoner excepted.

Should this evidence have been admitted? If not, it is because it is irrelevant. And if irrelevant, unless it could not possibly have prejudiced the prisoner, the judgment would be reversed because of its admission. To authorize the reversal of a judgment for admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature, that its admission may have prejudiced the prisoner. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, that is sufficient ground for reversing the judgment. (*Southern Mut. Ins. Co.* v. *Trear*, 29 Grat. 255; *Payne* v. *Com.* 31 Grat. 855.) We are of opinion, if the evidence was irrelevant, that its admission is ground for reversing the judgment, because we can not say, that the prisoner could not have been prejudiced by such evidence.

But is the evidence here irrelevant? In the trial of Dr. Webster for the murder of Dr. Parkman letters were received by the police-marshal of Boston, which purported to reveal the location of the body; and upon the trial they were proved to have been written by the prisoner to divert suspicion from himself and to prevent a rigid examination of the premises, where the murder was actually committed. (Whar-

ton Crim. Ev., sec. 742.) The numerous fabrications of evidence in behalf of the claimant in the Tichborne case had much influence in leading to the conclusion of his guilt. (Wharton Crim. Ev., sec. 742) Anything that a person charged with crime says or does voluntarily, which can have any bearing toward showing his guilt, is competent to go to the jury for what it is worth. The evidence may be exceedingly weak, yet the jury have a right to weigh it in connection with the other facts and circumstances of the case, and it is for the jury alone, if the evidence is relevant, to decide what weight it is to have in the case.

The bill of exceptions here shows, that it was proved that Doyle had been murdered, and on the same night "Little Bill Kinney" was arrested for the murder; that the evidence tended to prove that the prisoner was also implicated in the murder; that the prisoner had held out inducements to "Little Bill" to lay the charge of the murder on one Alonzo Bee; and that Monday after the murder, in the town of West Union, he went up to the brother of "Little Bill," and leaned over him and in a low tone of voice said: "Tell your father I want to see him and tell him to come right away." Connected with the other evidence and the message being delivered in a low tone, there seemed to be an air of mystery about it, that was unnatural under the circumstances. "Little Bill" was in jail; he could do nothing. It was natural for the prisoner to suppose, that the father of "Little Bill" would be willing to help him, and while helping him, he might help the prisoner, if suspicion could be thrown on some one else. I do not say that the jury would be justified in coming to this conclusion. But it seems to me that the jury had a right to consider the said evidence and give it such weight, as it ought to have and no more, and that the evidence was therefore relevant, and the court did not err in admitting it. The second bill of exceptions shows, that evidence had been introduced tending to show that the prisoner had held out inducements to "Little Bill Kinney" to lay the charge of the murder of Doyle on one Alonzo Bee; and the State introduced Mrs. Garrison as a witness, who testified that she was acquainted with "Big Bill Kinney;" that he stayed all night at her house the night after Doyle was killed; that "Big Bill" said if they would

let him in the jail with "Little Bill" he would find out all about it. Preston Hufford was also offered as a witness by the State, and said that "Big Bill" was at his grandmother's, the same Mrs. Garrison, who had given the above evidence, the next day after the murder of Doyle and said if they would arrest him on a sham and put him in jail, he could get a confession from "Little Bill." To this evidence the prisoner objected, but the evidence was admitted, and he excepted.

This evidence was relevant. It was a circumstance tending to show a desire to have the charge of murder fixed upon some one other than himself. Whether in connection with the other evidence in the case it should have little or great weight was a question alone for the jury.

The *third* bill of exceptions shows, that the State introduced George William Kinney, who was indicted for the murder of Bernard Doyle, for which he had not been tried, and who had been jointly indicted with prisoner for the murder of Annie Doyle, and who had been tried separately and convicted of the murder of the said Annie Doyle, and sentenced by the court to seventeen years in the penitentiary therefor, and who testified before the jury amongst other things, that he was present and saw the prisoner strike Barney Doyle on the back of the head with an ax, from which he then fell down and died, of which act of killing there was no other direct evidence before the jury; and therefore the defendant having laid the proper foundation therefor, offered evidence tending to show, that said George William Kinney, while confined in jail at Clarksburg after the time of the murder of the said Barney Doyle and Annie Doyle, stated in the hearing of a prisoner confined in jail, that George William Kinney had implicated and charged the prisoner with the murder of the said Bernard and Annie Doyle to save himself, the said George William Kinney. And thereupon the prisoner to further contradict the said George William Kinney offered to read a certain paper writing in the words and figures following:

"I wod never have done what i did if I had not A ben perswaid to by them that is a presecution; it is hard for to stand that *witch* a man is not *gilty* of; you will come out all

rite in that yet; you *neaid* not be on easy about it; i *wod* tell you all if i had chance to."

W. M. KINNEY.

The witness, George William Kinney, commonly known as "Little Bill Kinney," having been shown said paper by the counsel of the prisoner said, that it was a letter he (Little Bill") wrote in the jail at Clarksburg on the 18th of June, 1884, at the request and at the dictation of the prisoner; that said paper thus shown to him was not all the paper he wrote at said time, but was a part of a letter he wrote for the prisoner to one A. E. Wolf, about a charge against him for burning a house; that prisoner told witness what to write, and that he wrote just what Big Bill directed, and that it was directed to A. E. Wolf, whose name had been written on the bottom of the paper, and was there when he gave it to Big Bill, the prisoner; and the witness further stated that the signature to said paper was written by him for Big Bill's signature and at the prisoner's request, and that he then handed it to Big Bill.

The prisoner was then examined as to said paper and testified, that early in April, 1884, the witness, George William Kinney, came past the cell of the prisoner in the jail at Clarksburg, where they were both confined, and put said paper through the bars of prisoner's cell to him without speaking a word; that he the prisoner never spoke to said Wolf, about any prosecution against him, and never had made any accusation or charge of that kind against him, and had no occasion to write to him about any thing, and that said paper as produced at the trial is exactly as it was when handed into his cell by said George William Kinney.

A. E. Wolf also testified, that he never had any occasion to have any conversation with the prisoner or George William Kinney about any matter; and, so far as he knew, the prisoner had never accused him of committing any offence.

George William Kinney further stated, that the name to said paper was not his name, and thereupon the prisoner showed by the signature of said George W. Kinney to three papers, which he admitted to be genuine, that he usually signed his name "William Kinney."

The court refused to permit said paper or its contents to be

read to the jury for any purpose; and to said ruling of the court the prisoner excepted.

The Attorney General with commendable frankness says: "If the court should upon consideration of the testimony of the prisoner and A. E. Wolf and the contents of such paper without further explanation of the intent of the witness in making the writing believe, that such paper-writing contains matter, which could properly be construed as contradicting or tending to contradict the witness in his statement, that Doyle was killed by the prisoner, then the question as to the admissibility of the paper-writing is settled in my judgment by the authorities hereinafter cited, viz: *Gaffney* v. *The People*, 50 N. Y. 416; *The Queen's Case*, 2 Brod. and Bing. 284, (6 Eng. C. L. 147); 1 Starkie on Ev. 182 and note; 2 Phillips on Ev. 433, 437; 1 Greenl. Ev., sec. 462; 1 Wharton on Ev. secs. 551, 552; Wharton's Crim. Ev., sec. 483."

The authorities are pertinent and to our minds show, that the court erred to the prejudice of the prisoner in excluding the paper. If it referred to the case then on trial, it was the right of the prisoner to have the paper with the accompanying testimony with reference thereto go to the jury to enable them to decide whether it referred to the testimony of "Little Bill" as to the guilt of Big Bill, or whether it was written at the instance of Big Bill and signed for him to be sent to Wolf. The jury were to decide these questions; and if written by Little Bill in reference to his evidence against Big Bill Kinney, it certainly tended to contradict such evidence. It was certainly competent to go to the jury to be weighed by them.

In *Gaffney* v. *The People*, 50 N. Y. 416, the testimony of Curran, a witness, was sought to be contradicted by a written statement made by him. The court said: "In reply to an inquiry whether he did not state that the deceased left the saloon followed by the prisoner," he said, "I do not think I did." He was then asked: "Did you not further state, that a report came to the door shortly after, that some one was hurt?" and he answered, "I do not believe I did."

The written statement was then shown to the witness, and he was asked if he signed it, and he said, "I do not know; I made my mark to the statement." The statement was identified by the officer, to whom it was made.

After the prisoner's counsel rested his case, the written statement of Curran was offered in evidence by the prosecution and was objected to by the prisoner's counsel as incompetent; the objection was overruled, and the statement was read in evidence. The court by Andrews judge, said: "It is competent for a party on trial to prove, that a witness on the part of his adversary has made oral statements inconsistent with evidence upon a material question given by such witness on the trial, for the purpose of impeaching the credibility of the witness and breaking the force of the evidence. But it is requisite, that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statements were made, that he may have an opportunity of correcting the evidence given on the trial, or of explaining the apparent inconsistency between his evidence and his former statements. The reason of the rule applies as strongly to written as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should first be produced, so that he may have an opportunity for inspection or examination. And as the writing is the best evidence of the statement made by the witness thereon, questions as to the contents are not ordinarily admissible. * * In this case the paper was shown to the witness and he had the opportunity for examination. There was no objection to questions asked him as to its contents. The statements made in it were material to contradict the evidence of the witness on his examination in chief; and the objection to it, on the ground of incompetency was properly overruled."

This decision meets our approbation.

The case is more complicated here. The writing was shown to witness, and while he admitted he wrote and signed the paper, he said he wrote it for and at the dictation of Big Bill Kinney and signed Big Bill's name to it, and that it was intended for A. E. Wolf, against whom Little Bill said Big Bill had made a charge of burning a house. Big Bill denied this and said Little Bill handed the paper to him through the bars of the jail without speaking a word. Wolf also testified that he never heard of Big Bill

Kinney making any charge against him. It was also shown to the jury, that Little Bill Kinney usually signed his name "William Kinney." The paper is signed W. M. Kinney, and the W. M. may have been intended for an abreviation of "William."

In a case like this it was proper that the paper should be first shown to the witness, that he might make any statement he might choose, as to its execution or the circumstances connected with its execution, and if he as in this case admits he wrote it but claims he wrote it at the dictation of another, and signed that others name to it, whose name was the same as his own except as to one initial letter, it is then competent for other evidence to be introduced with regard to its execution, and if in any view of the case it tends to contradict the evidence of the witness in a material matter, it is competent evidence, if the jury believes it was the written statement of the witness, of which and of the weight it is to have they are the sole judges. The evidence was improperly rejected, and its rejection may have been to the prejudice of the prisoner.

The judgment and sentence of the circuit court is reversed, the verdict of the jury set aside, and the case remanded for a new trial.

REVERSED. REMANDED.

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WHEELING.

STATE v. THOMPSON.

Submitted June 22, 1885.—Decided July 3, 1885.

1. If an indictment for a misdemeanor barred in one year charges, that the offence was committed on the—day of — 1881, and the indictment was found in that year, it is good. (p. 151.)

2. Since the adoption of the constitutional amendment of 1880 there is no doubt, that in revenue cases the State has equal right with the defendant to exceptions in the court below and review on writ of error. (p. 152.)

3. In a case tried by a jury, no matter how many exceptions are taken to rulings of the court during the trial, unless a motion is made in the trial-court to set aside the verdict, and that motion is overruled and an exception taken, or objection made to the overruling of such motion is noted on the record, all such errors will by the appellate court be deemed to have been waived. (p. 152.)

The facts of the case appear in the opinion of the Court.

Alfred Caldwell, Attorney General, for the State.

The indictment in this case sought to punish a violation of sec. 1, ch. 32 of the Code as amended by the Acts of 1877, according to the provisions of ch. 22, Acts of 1879, and is good, whether considered as an indictment under sec. 1, ch. 32 as amended or under the Acts of 1879, the plain meaning of which, too plain for different construction, was recited in the first instruction. Any other construction would nullify the act.

The instructions embodied in the second bill of exceptions seem also perfectly proper and, it is submitted, should have been given to the jury by the court below.

The bill of exceptions No. 3 sets out all the facts proven, as well as those proven by the State as those by the defendant. It is respectfully insisted that the judge below clearly erred, both in his opinion given to the jury, as recited in said bill No. 3, and also in giving any opinion of his to the jury, if it was a fact for them to determine, whether the Ohio river constitutes a boundary line between the States of Ohio and West Virginia, as he instructed them.

The court below should have granted the State's motion for a new trial, as the verdict was clearly contrary to the law and evidence. The case of the *State* v. *Plants*, 25 W. Va. 685, seems decisive of the State's motion for a new trial. The defendant had been shown to have violated sec. 1, of ch. 32 of the Code as amended by the Acts of 1877. He was clearly proven to have been guilty of selling whisky and beer within the county of Mason without a State license. See bill of exceptions No. 3 and Constitution of West Virginia, Article II., sec. 1.

It is submitted that the court below erred in not giving the instructions asked for by the State, in giving the opinion to the jury recited in bill of exceptions No. 3, and in refusing a new trial to the State. The changes made in the indictment, were immaterial and in no way injured the defendant. The indictment was perfectly good before they were made, and the

fact that they were made, not adding anything material to the indictment, could not prejudice the accused.

No appearance for defendant in error.

JOHNSON, PRESIDENT:

In September, 1881, the defendant was indicted for selling spirituous liquors, &c., without license. The indictment charged the selling on the —— day of ——, 1881, and the place of sale, "On the Ohio river, at a point opposite Burns' landing in the county aforesaid."

The defendant demurred to the indictment, in which the State joined and the matters of law arising on the demurrer being argued, the court took time to consider the same.

The defendant moved also to quash the indictment, because it did not conform to the record of the finding thereof. The indictment was against John Neale Thompson and concludes: "The said John Neale not being then and there a druggist, against the peace and dignity of the State," which motion was overruled; and thereupon the attorney for the State moved the court to allow him to amend the indictment by inserting the name "Thompson" instead of "Neale," where it occurs in the latter part of the indictment. To the making of this amendment the defendant by his counsel objected, which objection was overruled, and the amendment was allowed to be made, and the defendant excepted.

The motion to quash and the demurrer were overruled; and the defendant pleaded not guilty. On September 5, 1882 the issue was tried by a jury, and on September 6, 1882, the jury rendered a verdict of "not guilty." The State saved three bills of exceptions to rulings of the court during the trial, the first and second to the refusal to grant instructions, and the third to an opinion given to the jury by the court.

The State moved to set aside the verdict of the jury, which motion was overruled; and the State obtained a writ of error to the judgment rendered on the verdict of the jury.

The change made in the indictment by inserting the name "Thompson" instead of "Neal" was immaterial and did not prejudice the defendant. And being the mere correction of a misnomer was authorized by the statute, Code ch. 158, sec. 10. The indictment was good, unless it showed on its

face, that the offence was committed outside of the jurisdiction of the court. It showed clearly on its face, that the offence was charged to have been committed within a year before the finding of the indictment. The indictment was found in September 1881, and it charged the offence to have been committed on the —day of—1881. This was sufficient. It would have been bad, if no date had been inserted, which would have shown, that the offence was committed within a year before the indictment was found. (*State* v. *Bruce*, *infra*.) The State undoubtedly had a right to a writ of error, the same as the defendant would have had. Whatever doubt may have heretofore existed as to the right of the State in a revenue case to move to set aside a verdict against it or to except to any ruling made to its prejudice and have the same reviewed and corrected on writ of error, all such doubt is removed now by the adoption of the amendment to the constitution in 1880, which reads, Art. VIII, sec. 3, speaking of the appelate jurisdiction of the Supreme Court of Appeals: "It shall have appellate jurisdiction in criminal cases, where there has been a conviction for felony or misdemeanor in a circuit court, and where a conviction has been had in any inferior court and affirmed in a circuit court, *and in cases relating to the public revenue, the right of appeal shall belong to the State as well as the defendant.*" So there can be now no doubt, that in cases relating to the public revenue the State has the right of exceptions all through the trial and the right to have all errors against it reviewed, as well as the defendant in such case.

The indictment is good and the motion to quash was properly overruled.

The State it is true moved for a new trial, which motion was overruled, but the State did not object on the record to the overruling of the motion for a new trial. The only entry with regard to the matter is: "The court hereby certifies, that after the verdict was rendered in this cause, and before the judgment was rendered therein, the attorney prosecuting for the State moved the court to set aside the verdict, because the same was contrary to the law and the evidence, which motion was overruled by the court, and said verdict not set aside." In a case tried by a jury, no matter how

many exceptions are taken to rulings of the court during the trial, unless a motion is made in the trial-court to set aside the verdict, and that motion is overruled and an exception taken or an objection to such overruling of said motion noted on the record, all such errors will by the appellate court be deemed to have heen waived. (*State* v. *Phares*, 24 W. Va. 757; *Danks* v. *Rodeheaver*, *infra*.) The errors therefore of the court, if any, in the instructions given and refused can not be considered, as by the failure to object to the overruling of the motion for a new trial the State acquiesced therein and waived all the errors committed during the trial.

The judgment of the circuit court is affirmed.

AFFIRMED.

WHEELING.

STATE *v.* BRUCE.

26 153
41 601

Submitted June 23, 1885.—Decided July 3, 1885

1. The general rule is, that each count in an indictment must be sufficient in itself to make a complete indictment; and averments in one count can not aid defects in another. To some extent repetitions may be avoided by referring from one count to another; but the reference must be so full and distinct as in effect to incorporate the matter going before with that in the count in which it is made. (p. 155.)

2. Our statute—sec. 10, chap. 158, Code—providing that no indictment shall be quashed or deemed invalid for omitting to state the time at which the offence was committed, when time is not of the essence of the offence, does not make valid an indictment which fails to aver any date, or that the offence charged was committed at a time within the statutory bar, when the offence is one which the statute declares shall not be prosecuted after a prescribed limitation. (p. 156.)

3. Section 21 of chap. 158 of the Code, which declares, "no exception shall be allowed for any defect or want of form in any presentment or indictment founded on any provision of chap. 32 or 151," &c., is intended merely, to exclude defences which do not put in issue the truth of the charges averred in the indictment; and it does exclude exceptions to an indictment which avers facts

that may be true and still not necessarily show the accused to be guilty of subsisting offence. (p. 157.)

4. An indictment for selling spirituous liquors, which fails to aver the date of the sale or that the sale was made within one year from the time the indictment was found by the grand jury, is fatally defective and will be held bad on demurrer. (p. 157)

A statement of the facts of the case will be found in the opinion of the Court.

Alfred Caldwell, Attorney General, for the State.

The first assignment of error is the overruling of the demurrers to the indictments.

The first count in each indictment is good under § 1, ch. 32, of the Code, as amended by ch. 107, Acts 1882. (*State* v. *Pendergast*, 20 W. Va. 672; *State* v. *Cox*, 20 W. Va. 797.)

It is objected to the second counts, that they do not state the dates of the commission of the offences. This was not necessary, as time is not of the essence of the offence. (Code, ch. 108, § 10.) This section also cures the omission of the word "oath" in the first count of indictment No. 1. See also Code, ch. 158, § 21.

The second assignment of error is that the court erred in rendering judgment against the defendant in the absence of criminal intention. The intent here is immaterial. (*White* v. *Comm.*, 78 Va. 484.) Moreover the accused is presumed to intend the natural consequences of his acts. (78 Va. 732.)

The prescriptions furnished no excuse or protection to the defendant, being fatally defective, (Code, ch. 32, § 4, as amended, Acts 1877,) of which the druggist was bound to take notice.

The cases were submitted to the court in lieu of a jury and should not be reversed because of the overruling of the demurrers to the second counts, even if those counts were bad; for there was ample testimony applicable to the first counts to sustain the judgments, and the evidence was all admissible. But if improper testimony had been introduced because of the defective indictments, it would not have affected the judgments. But if the court erred in overruling the demurrer, the defendant was not prejudiced thereby.

The pharmacy act (ch. 112, Acts 1882) does not relieve a druggist from the provisions of §§ 1 and 4, ch. 32 of the Code as amended. The two acts can stand together.

James H. McGinnis for plaintiff in error.

SNYDER, JUDGE:

The defendant, L. W. Bruce was, at the May term, 1882, of the circuit court of Summers county indicted in two cases, which were at the September term, 1882, by consent tried together by the court, who found the defendant guilty and fixed his fines and gave judgment for $25.00 and costs in each case. The defendant moved the court to set aside its judgment, which motion being overruled, he excepted and by bill of exceptions had all the facts proved certified. The two indictments are substantially the same, and in form as follows:

"The jurors of the State of West Virginia in and for the body the county of Summers now attending the said court upon their oaths present that L. W. Bruce, on May 1, 1882, at his drug store in the county aforesaid, did sell spirituous liquors without license so to do, against the peace and dignity of the State.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that the said L. W. Bruce, in the county aforesaid, was a druggist, and as such druggist, at his drug store in the town of Hinton, in the county aforesaid, did then and there unlawfully sell alcohol, spirituous liquors and wine, said sale not having been made for medicinal or manufacturing purposes, against the peace and dignity of the State."

The defendant demurred to the indictment and to each count thereof, which demurrers were overruled and the cases tried on the pleas of not guilty. The defendant obtained this writ of error.

The first question to be decided is: Did the court err in overruling the demurrers to the indictments? The first counts of each of the indictments are under sec. 1 of ch. 107 Acts of 1877, and plainly good. *State* v. *Pendergast*, 20 W. Va. 672.

The second counts are under the fourth section of said act and are sufficient, unless the omission to give any date to the offence in either is a fatal defect.

The general rule is, that each count in an indictment must be sufficient in itself to make a complete indictment, and averments in one count can not aid defects in another. To some extent the pleader may avoid repetitions by referring

from one count to another. But the reference must be so full and distinct, as in effect to incorporate the matter going before with that in the count in which it is made. Thus, when the first count charged a larceny of goods of a value mentioned, and the second alleged a receiving of the "goods aforesaid," this was held not to draw into the second count the allegation of value contained in the first. 1 Bish. Crim. Pro., sec. 431; *The State* v. *Lyon*, 17 Wis. 237; *The State* v. *McAllister*. 20 Me. 374.

The second counts in this case give no dates whatever, nor do they refer to the preceding counts in a manner to supply this omission, unless this is done by the use of the words, "then and there." In the counts preceding a date and place are given. In the second no date is given, but a place, described differently from that in the first, is stated immediately preceding the words "then and there." Thus, upon any fair construction the word "there" in the second count must refer to the place named just before in the same count and not to the place mentioned in the first count. The word "there" thus necessarily refering to the place named in the second count, it would, it seems to me, be a forced construction to hold that the word "then," connected as it is with the word "there," refers to the preceding and not to the same count that the word "there" does. It is true, there is no time mentioned in the second count to which the word "then" can properly refer, but even this does not authorize us to conclude that the pleader used this word as a reference to the preceeding count. The rule is, that the reference must be so full and distinct, as in effect to incorporate the date mentioned in the first count into the second count. I think this has not been done and that the second counts in each indictment fail to give any date to the offences charged. The words "then and there" generally refer to a time and place set forth in a preceding part of the same count or sentence, and when it is intended to incorporate something from a distinct count or sentence the words "aforesaid" or "before mentioned," are used.

Our statute, however, provides that, "No indictment or other accusation shall be quashed or deemed invalid * * * for omitting to state, or stating imperfectly, the time at

which the offence was committed, where time is not of the essence of the offence."—Sec. 10, ch. 158, Code p. 714.

By the common law, every indictment must allege the time the offence was committed; but, while this allegation was always treated as essential, it was mere form, unless some special reason rendered it important, and it was not required ordinarily to be proved as laid. 1 Bish. Crim. Pro. § 386. This has been modified by the statute above quoted, so that it is not now essential to aver the time of the offence in an indictment unless time is of the essence of the offence. In misdemeanors it is essential that it should appear from the indictment, that the offence was not barred by the statute of limitations at the time the indictment was found; for, otherwise it would not show that the offence was a *subsisting* and therefore indictable offence. The second counts in these indictments were, therefore, bad. It is of course unnecessary to allege any particular date or day in such cases, but it is indispensible that the indictment should disclose on its face that the offence was committed within the statutory limitation.

It is, however, insisted for the State that the omission to give any date in these counts is cured by sec. 21 of chap. 158 of our Code, which declares that, "No exception shall be allowed for any defect or want of form in any presentment or indictment, founded on any provision of chap. 32 or 151, but the court shall give judgment thereon according to the very right of the case."

The provisions of this statute are taken from a similar statute in Virginia and it was there construed to exclude defences which do not put in issue the truth of the charge against the defendant. *Atkinson's Case*, 2 Va. Cas. 513. In *Young's Case*, 15 Grat. 664–66, the court after quoting the Virginia statute, says: "If the indictment may be true, and still the accused may be not guilty of the offence, the indictment is insufficient, even though it fall within the class to which the provision aforesaid refers." This decision shows plainly that the statute does not cure the defect in the indictments now before us; for, as we have seen, every averment they contain may be true and still the accused may not be guilty of a subsisting, indictable offence.

It is further contended for the State that, even if the second counts of the indictments were bad on demurrer, the judgment should not be reversed by this Court, because the cases, having been tried by the court in lieu of a jury, and the evidence certified being applicable and sufficient to sustain a conviction upon the first counts, we must presume that the trial-court based its finding and judgment upon those counts and not upon the bad counts. *Abrahams* v. *Swann*, 18 W. Va. 274.

This proposition is no doubt true, provided it appears from the whole record before us, that the defendant was not prejudiced by the error of the court refusing to sustain his demurrers to the second counts of the indictments. It is certainly the law, that where the court has committed an error in the pleadings, this court will presume the person against whom such error was committed was prejudiced and the burden is on the opposite party to show by the record that there was no such prejudice. *Hopkins* v. *Richardson*, 9 Grat. 485.

The first counts in these indictments, as we have seen, are founded upon sec. 1, ch. 107, Acts of 1877. The minimum fine imposed for the offence charged against the defendant under this section, is $10.00. The second counts are, as before stated, based upon the fourth section of said act, and the minimum fine for the offence charged in those counts, is $20.00, and by sec. 9, ch. 112, Acts 1882, it is made $25.00. In this case the minimum fine of $25.00, as provided in this last mentioned statute, was imposed by the court for each of the offences charged. Now, it does not seem to me, that we can say, that the court, if it had been of opinion the defendant could not be convicted of the greater offences attempted to be charged in the second counts, would have fixed the fines at $25.00 each. The proof certified, while it was admissable under either count, shows plainly that it had special reference to the allegations of the second counts. The finding of the court being the minimum fine under this count, would seem to indicate that the court intended to punish the offence charged with the minimum fine and that it would, if the second counts had been stricken out, in all probability, have made the fines $10.00 in each case instead

of $25.00. At all events, we can not certainly determine from the record before us, that such would not have been the case. The presumption from the admission of improper counts, being that the defendant was prejudiced, and the record not showing certainly such was not the fact, the judgment must be set aside, the demurrers to the second counts sustained and the cases remanded to the circuit court for a new trial on the first counts in the indictments.

REVERSED. REMANDED.

26 159
36 631
20 159
f47 358
26 159
64 695

WHEELING.

SUMMERS v. COUNTY OF KANAWHA.

Submitted Sept. 13, 1883.—Decided July 3, 1885.

1. The purchaser of land sold for taxes, who has obtained his tax deed therefor, and had the same duly recorded in the proper county, becomes invested with such estate in and to the land so purchased by him, as at the commencement of, or at any time during the year for which the said taxes were assessed, was vested in the party assessed with said taxes. (p. 172.)

2. If at the time of such sale the land sold be under a mortgage or deed of trust, or if there be any other lien or incumbrance thereon, and such mortgagee, trustee, *cestui que trust*, lienor or incumbrancer shall fail to redeem the same within the time prescribed by law, then all the right, title and interest of such mortgagee, trustee, *cestui que trust*, lienor or incumbrancer, shall pass to and be vested in the purchaser at such tax-sale, and his title to the premises shall in no way be affected or impaired by such mortgage, deed of trust, lien or incumbrance. (p. 172.)

3. Where land has been so purchased by and conveyed to the purchaser, and his tax-deed therefor has been duly recorded, and before the land was so sold, it had been conveyed to a trustee to secure the payment of a debt, such tax-deed will extinguish the title vested in such trustee by said deed of trust. (p. 173.)

4. Where the trustee in such deed of trust pretends to sell and convey the land so conveyed to him as trustee under the provisions thereof, after the said land has been sold for the delinquent taxes thereon, and the purchaser thereof at such tax-sale has obtained and duly recorded his tax-deed therefor, such pretended sale and

conveyance of said land by such trustee will be inoperative and void. (p. 173.)

5. Where a debt is secured by a deed of trust upon the land of the debtor, not in the possession of the creditor, who is not otherwise interested in the said land, such creditor is under no obligation to pay the taxes upon said land in the absence of any covenant, promise or agreement to do so. (p. 170.)

6. Where such trust-creditor is neither in possession of the lands charged with such trust-debt nor bound by any covenant, promise or agreement to pay the taxes thereon; and where no relation of trust or confidence between him and the trust-debtor exists, he is not precluded from acquiring at a tax-sale the title to the land conveyed by said deed of trust to secure the payment of his trust debt. (p. 171.)

7. Where a trust-creditor, whose debt is secured by a deed of trust upon a tract of land liable to be sold for the non-payment of the taxes thereon, instead of paying such taxes or redeeming the land from the purchaser at a tax-sale thereof becomes himself the purchaser thereof in his own name or in the name of another acting as his agent for that purpose, he will be regarded as having elected to hold the land as such purchaser, subject to all the advantages and disadvantages pertaining to his character as such; and he will not be permitted to treat his purchase at the tax-sale as a payment of the taxes, or a redemption of the land without the consent of his ~~creditor~~ debtor. (p. 170.)

8. Where a tract of land has been sold for taxes, and after such sale, and before the title of the purchaser has become absolute, the county court of the county, in which the land lies, has by proper proceedings regularly established a public road over said land without compensation with the consent in writing of the owner thereof in fee, and such purchaser afterwards obtains a tax-deed for said land and has the same duly recorded, such tax-deed will not confer upon him any right to demand and recover any compensation for the land so appropriated for such public road; and if such purchaser afterwards conveys said land to a third party, his deed to such *third* party will not confer upon him any right to such compensation or damages. (p. 174.)

The opinion of the Court contains a sufficient statement of the facts:

W. A. Quarrier and *W. S. Laidley* for the plaintiff in error.

J. H. & J. F. Brown for defendant in error.

WOODS, JUDGE:

On November 4, 1878, Lewis Summers filed his petition in the county court of Kanawha county, alleging, that on Feb-

ruary 10, 1871, he sold and conveyed to J. B. Walker a tract of land containing 160 acres, at the price of $40,000.00; that to secure the payment of the unpaid purchase-money, viz: $37,000.00, with interest from that date, the said Walker on the same day, conveyed said land to W. S. Laidley, in trust, with power to sell, in case default should be made in the payment of any of the instalments of said purchase-money; that the county court of Kanawha county, on November 2, 1875, without his knowledge or consent, established through said land, a public road, and that nothing has ever been paid, or tendered to him, or to said Walker, or to any other person for said road; that on February 17, 1877, the trustee Laidley, by virtue of said trust-deed, sold the 160 acres of land, for the purpose of collecting the unpaid purchase-money; that the proceeds of the sale, were insufficient to pay the same, leaving a deficit of $13,747.67 due to petitioner, which remains unpaid. Petitioner further alleged that he is now, and he has been since the sale under the said trust-deed, the owner in fee of the 160 acres of land; that said public road is part and parcel of said land, and the same is now held, owned and controlled as a county road; and he prayed that a writ of *ad quod damnum* be awarded to him, directing a jury to go upon the land and say what amount shall be paid petitioner by said county for the land taken for the road, and damages done to the residue of his land. The county answered the petition, and denied petitioner's right to the writ of *ad quod damnum*, even if the matters alleged in his petition were true; *first*, because such a lienor as petitioner claims to be, is not entitled to compensation for land appropriated for a county road, on which the lien may exist; and *second*, because the alleged lien on the land was, at the time the road was established, extinguished, as the 160 acres of land was on October 21, 1875, sold by the sheriff of Kanawha county to Wm. H. Hogeman for the non-payment of taxes assessed thereon for the year 1873, in the name of J. B. Walker, and the same not having been redeemed was conveyed by the clerk of the county court of Kanawha county to said Hogeman, by deed dated November 28, 1876, and recorded in the clerk's office of said county court on the same day; and *third*, because after the alleged tax-sale, the trustee

W. S. Laidley dedicated said road to the public, which dedication was afterwards ratified and confirmed by said petitioner. To this answer Summers replied, denying the alleged ratification, and alleging in substance that he furnished the money to Hogeman to purchase said 160 acres of land, and directed him to purchase the same, which he did; that he paid all the costs and expenses in making the report of the surveyor, and for the deed to Hogeman for said land, and for making the deed and transfer from him to petitioner; that he conveyed the land to petitioner by deed dated November 29, 1876; that Hogeman out of his own money paid nothing for said land, but for this purpose he used the money of petitioner, and was acting for petitioner as his agent; that the sale was neither more nor less than a redemption by petitioner of the 160 acres of land; that the same was so treated by petitioner and Hogeman, and that petitioner afterwards proceeded to enforce his trust-lien, by selling the land at public sale, at which he became the purchaser thereof.

The county court on the trial of the cause, refused the writ of *ad quod damnum* and dismissed the petition. To this ruling of the county court, the petitioner excepted and tendered his bill of exceptions certifying the facts proved on the trial which are as follows: On February 10, 1871, Lewis Summers and wife, by deed of that date sold and conveyed to J. Brisben Walker, a tract of land in Kanawha county containing 160 acres, and for the unpaid purchase-money thereof he executed to Summers eight notes of that date for the following amounts: One for $1,974.00, and two for $2,220.00, each payable respectively on January 1 in each of the years 1872, 1873 and 1874; and five for $7,400.00 each payable respectively, on January 1, in each of the years 1874, 1875, 1876, 1877 and 1878, with interest on said last five notes from January 1, 1874, until paid. To secure the payment of these notes, as they should fall due, said Walker by deed dated February 10, 1871, conveyed said 160 acres of land to W. S. Laidley, trustee, with power to sell for cash to the highest bidder, so much of said land as might be necessary to pay off and discharge so much of said debts as might then be due and remain unpaid. On September 1, 1873, the said Walker conveyed the 160 acres of land together

with 110 acres purchased from James L. Carr, and 90 acres purchased from Holly Hunt, to the West Charleston Extention Company. These lands adjoined each other and also the city of Charleston, and had been laid off by J. B. Walker into streets, alleys and town lots, as an addition to the extension of that city. These three tracts, described as one tract of 370 acres, were entered upon the assessor's land-book of Kanawha county for the year 1873 in the name of said Walker, and were assessed with taxes for that year amounting to $883.40. In the year 1874, a tract of 210 acres, part of said 370 acres was entered upon said land book in the name of the West Charleston Extension Company and assessed with taxes thereon for that year amounting to $552.19 and both of said tracts embraced and included said 160 acres These lands were returned delinquent for the non-payment of said taxes, and on October 21, 1875, were sold by the sheriff of said county and at such sale William H. Hogeman became the purchaser of the 370 acres at the price of $1.210.90, and of the 210 acres at the price of $716.60, and not having been redeemed the clerk of the county court of Kanawha county, by deed dated November 28, 1876, conveyed to Wm. H. Hogeman the tract of 370 acres sold in the name of J. B. Walker, for the taxes delinquent thereon for the year 1873, and by similar deed, dated December 14, 1876, he conveyed to said Hogeman the tract of 210 acres, sold in the name of The West Charleston Extension Company, for the taxes delinquent thereon for the year 1874, both of which deeds were duly recorded in the clerks office of the county court of Kanawha county, on the days of their respective dates. On November 29, 1876, Wm. H. Hogeman, by deed of that date, conveyed with covenants of special warranty, to said Lewis Summers, the tract of 160 acres, and to Holly Hunt, the tract of 90 acres of land, having on April 17, 1876, by deed of that date, conveyed his equitable title in the tract of 110 acres to Wm. A. Quarrier, as trustee for James S. Carr. On November 2, 1875, the said county court by proceedings regularly had therein, with the consent in writing of The West Charleston Extension Company, and without compensation, established a public road through said 160 acres of land. On February, 17, 1877,

the trustee, W. S. Laidley, under the provisions of said deed of trust, sold said 160 acres in parcels, all of which were purchased by said Lewis Summers at the aggregate price of $21,000.00, and conveyed the same to him on the same day, leaving unsatisfied of the trust-debt, a balance of $13,747.67. On March 7, 1877, said Hogeman executed to said Summers a second deed, conveying to him the tract of 210 acres purchased by him at said tax-sale, on October 21, 1875, for the taxes delinquent thereon in the name of The West Charlestom Extension Company. The money used by Hogeman in purchasing the 370 acres of land sold by the sheriff of Kanawha county, on October 21, 1875, was furnished to him for that purpose by said Summers and Hunt, he acted for them, as their agent in making said purchase, and they paid the expenses of making the reports, deeds, &c., to and from Hogeman, in connection with said sales, and nothing was paid by Hogeman for said land, or to him for the conveyances made by him to Summers, Hunt and Quarrier, and that the road is now used as a public road, and runs through the 160 acre tract of land. To the judgment of said county court denying the writ of *ad quod damnum*, and dismissing his petition, Lewis Summers obtained a writ of error from the circuit court of Kanawha county, and upon the hearing thereof the judgment of said county court was, on May 26, 1880, by said circuit court, affirmed with costs. From this judgment of the circuit court, a writ of error has been allowed by this Court. On the hearing of the writ of error in the circuit court, three grounds of error were assigned, and the same are relied upon here, with the additional one, that the circuit court erred in affirming the judgment of the county court. It is insisted by the plaintiff in error, that the county court erred. *First*, In deciding that Summers had not shown himself entitled to any compensation or damages. *Second*, In refusing to award him the writ of *ad quod damnum* as prayed for; and *third*, in dismissing his petition.

It will be unnecessary to consider or decide the question discussed by the counsel for the defendant in error, whether the plaintiff in error, in his character of a lien-holder, is, under the constitution and laws of this State, entitled to compensation or damages when part of the land subject to the lien has

been dedicated without compensation by the owner thereof for a public use.

The petitioner rests his right to the writ of *ad quod damnum* upon the ground that he was at the time of filing his petition, and ever since the sale of said land, under said trust-deed on February 17, 1877, the owner in fee of said 160 acres of land, of which said public road is a part, and that the same was established without his previous consent or subsequent ratification, and without any compensation therefor ever having been paid or tendered to him, or to Walker, or to any other person. It will be observed that the petitioner does not aver, that he became the owner in fee of said land by virtue of the sale and conveyance made to him by the trustee, Laidley, under said deed of trust, but only, that he has since that time, been such owner in fee. For aught that appears in his petition, he may have become the owner thereof in fee, in various ways *before* February 17, 1877, when the same was sold and conveyed to him by the trustee, Laidley. This is one of the grounds of defence relied upon by the county court in its answer, and is fully proved by the evidence, as well as by the admission of the petitioner in his replication.

The answer of the defendant in error to said petition, denied the petitioner's right to the writ of *ad quod damnum*, because the petitioner neither at the time the said road was established, nor at the time of filing his petition had any valid subsisting lien on said land, as the same had been lost and extinguished by virtue of the fact, that this land which had been conveyed from Walker to Laidley, trustee, had been on October 21, 1875, sold for the non-payment of the taxes assessed thereon in the name of Walker, for the year 1873, by the sheriff of said county to said Hogeman, which not having been redeemed was conveyed to him by the clerk of the said county court by deed dated November 28, 1876, and on the same day recorded in the office of the clerk of the county court of said county.

These facts are not controverted; but in order to break their force, the petitioner, Lewis Summers, by his replication alleged, and on the trial proved, that in making the purchase, and in obtaining from the clerk of the said county

court the deed for the 370 acres, which included the 160 acres, William H. Hogeman acted as the agent of petitioner, so far as the tract of 160 acres was concerned, and that the purchase-money paid therefor, and all expenses incurred in obtaining the deed, and making the transfer to petitioner of the 160 acres, were by him furnished to Hogeman, who of his own money paid nothing for the land, and received nothing for the conveyances made by him to Hunt, Summers, or Quarrier, trustee.

We are not called upon to determine what may be the effect of this transaction, in a controversy between the petitioner and J. Brisben Walker or his vendee the West Charleston Extension Company, as no such controversy appears. So far as this record shows, no person claiming this land, or any title thereto, or interest in, or any lien or incumbrance on the same, is attempting to controvert the right of the petitioner to purchase the 160 acres of land at the tax-sale, either in his own name, or in the name of another acting as his agent for that purpose; nor is any one controverting the legal proposition, that by the tax-sale to Hogeman he thereby acquired every right, title or interest in and to the land, which, by virtue of the provisions of ch. 117 of the Acts of the Legislature of 1872 and 1873 could be so acquired, by any *bona fide* purchaser, even though he acquired the same for the benefit of another, to whom he afterwards conveyed the land. The petitioner had a direct and plain remedy to prevent the sale of the land by paying the taxes; he had a remedy equally plain and direct to prevent the purchase of Hogeman from becoming absolute by redeeming the land at any time within one year from the day of said sale. A resort to either of these remedies would have preserved to petitioner the security for his debt afforded by his deed of trust; but in that case the equity of redemption in Walker or the West Charleston Extension Company would also have been preserved to it, while by a tax-sale of said land to a stranger, the land itself and the trust-lien thereon, as well as the equity of redemption might all be lost. The petitioner had the right to elect which of these remedies he would adopt; and he elected to become a purchaser of the land at the tax-sale, with all the advantages incident thereto,

and having made this election, and secured to himself these incidental advantages, it seems reasonable and just that if any disadvantages attached to such election he should be held to have elected them also; and especially so, if they who were thereby divested of their equity of redemption in the property so purchased, made no objection to his purchase.

What then was the legal effect of the sale and conveyance made to Hogeman of the 160 acres of land, upon the right of J. B. Walker, The West Charleston Extension Company, W. S. Laidley, and the petititioner? On January 1, 1873, the legal title to the 160 acres of land was vested in the trustee W. S. Laidley, to secure to petitioner the payment of his trust-debt, as the several instalments thereof should become payable, and the equity of redemption therein, as well as the actual possession of the land were in Walker, and after September 3, 1873, in the West Charleston Extension Company. The taxes for that year were assessed in the name of Walker and for the non-payment of these, the land on October 21, 1875 was sold to Hogeman.

The 29th chapter of the Code of 1869 then prescribed the time when, and the mode in which all real and personal property subject to taxation, should be assessed, and designated the persons whose duty it was to pay the taxes thereon. By the 39th section of that chapter the assessment of taxes was to date as of the first day of April, and it was made the duty of the assessors to begin on that day and proceed without delay to ascertain all personal and real property subject to taxation in his district, and said section declared that "the taxes for each year, upon real and personal property shall be paid by those who are the owners thereof on that day, whether it be assessed to them or to others." By the 40th section of that chapter it is declared that "the person who by himself or his tenant has the freehold in possession whether in fee or for life shall be deemed the owner for the purpose of taxation;" and that "a person who has made a mortgage or deed of trust to secure a debt or liability, shall be deemed the owner, until the mortgagee or trustee takes possession, after which such mortgagee or trustee, shall be deemed the owner." By the 49th section of the same chapter, it was in substance declared, that all personal property, including debts

of every kind, owing to any person, whether due or not due, secured or unsecured, was required to be listed for taxation by such person or some one for him. For the year 1873 Walker, as owner of the 160 acres of land was chargeable with, and bound to pay the taxes for that year assessed thereon, and Summers as the owner of the debt secured by said deed of trust was chargeable with, and bound to pay the taxes assessed upon the amount of the debt, and no liability rested upon either, to pay the taxes assessed upon the property of the other. The land was sold under the provisions of chap. 117 of the Acts of the legislature of 1872–3, the first section of which declares: "There shall be a lien on all real estate for the taxes assessed thereon from the day fixed by law for the commencement of the assessment of said taxes in each year, and interest upon such taxes at the rate of six *per cent. per annum* from the first day fixed by law for the payment of such taxes into the treasury until payment." The lien of the State for its taxes on the land for 1873, was superior to that of the deed of trust to Laidley, to secure the trust-debt to Summers, which was liable to be lost, if the taxes were not paid, Summers therefore, to the full amount of his trust-debt, and Walker, and The West Charleston Extension Company, to the extent of the full value of the land, were interested in having the taxes on the land paid. It was the duty of Walker, to pay these taxes, and thus protect the security afforded to Summers by his deed of trust; and his interest to do so, was still greater than that of Summers, for if the taxes were not paid, he was liable to lose the land and he would still be compelled to pay the trust-debt.

Although neither Walker, nor the West Charleston Extension Company has called in question the right of Summers to become the purchaser of the land at the tax-sale, either in his own name, or in that of Hogeman as his agent; yet desiring to claim the title to said land under the sale and conveyance made to him by the trustee Laidley on February 17, 1877, as well as under said tax-deed, his counsel has suggested in argument, that the purchase of the land at said tax-sale made by his agent, ought to be considered a payment of the taxes, or redemption of the land, rather than a purchase thereof. In this connection his counsel has suggested, that

Summers was precluded from acquiring the title to said land, at said tax-sale. It is admitted that some persons from their relation to the land or the tax, are precluded from becoming such purchasers. The title to be transferred on such a sale, is one based on the default of the person whose duty it is to pay the government the tax. "But one person may owe this duty to the government, and another may owe it to the owner of the land. This occurs where the tenant in possession of the land has obligated himself to pay the taxes. So the mortgagor remaining in possession owes it to the mortgagee to pay the taxes, and the general principle applicable in all such cases is, that a purchase made by one whose duty it was to pay the taxes, shall operate as a payment only; for he shall acquire no right against a third party, by a neglect of the duty which he owed to such party. This principal is universal, for when the existence of the duty is shown, the disqualification is is made out. This rule applies where the default was only in part that of the purchaser, as where he was tenant in common with others; or where his own land was taxed as one parcel with that of another, and the whole was sold together; and to a case where an agent to pay taxes, purchased the land of his principal, and assumed to justify himself on the ground, that his principal had neglected to furnish him money to pay the taxes. In all such cases, and in all cases to which like reasons apply, the purchase as *between the parties* is in law a payment only; or if the purchase be made at second hand from another who was the purchaser at the public sale, it will be allowed for the purposes of justice, only as a payment." Cooly on Taxation, 345. A mortgager can not, by acquiring a tax-title upon the land, defeat the lien of the mortgagee, for it was his duty to pay the taxes, and he is not allowed to acquire a title through his own default. Where the taxes are paid by one who has merely a lien on the land, there was of course no obligation upon him to pay the taxes; and although he may acquire the tax-title to protect his own lien, he will not be allowed to set up that title, to defeat a prior lien. A mortgagee may purchase the mortgager's equity of redemption. The relation between them is not so far analogous to that between a trustee and a *cestui que trust*, as to preclude the mortgager from purchasing. The trustee has a

duty to perform in selling for the best advantage of the beneficiary, and this is inconsistent with his personal interest, to obtain the property on terms advantageous to himself.

But there is no trust relation between the mortgagor and mortgagee. The mortgagee is under no obligation to protect the equity of redemption. The general rule is, that the mortgager may acquire the equity of redemption, either directly from the owner, or at a sale by his assignee in bankruptcy, or by his creditor upon execution. Jones on Mortgages, sec. 711–713; Desty on Taxation, sec. 146. The same principle was decided in *Waterson* v. *Devoe*, 18 Kan. 233, where the court held that a mortgager not in the possession of real estate, was under no obligation to pay the taxes on the mortgaged premises; and that the mere relation of mortgagor will not prevent the person so related from acquiring title to the mortgaged premises by purchase at a tax-sale. In that case, Waterson the mortgagee, neither had the actual possession nor the right to the possession as mortgagee of the premises. He was required to pay taxes on his note and mortgage, and when he discharged that duty, he performed his obligation, so far as his mortgage and note were concerned. He neither covenanted nor agreed to pay Devoe's taxes. On the contrary Devoe was under obligation to pay the taxes on the land, for it was his duty to protect the lien or security of Waterson, by payment of the taxes on the land, so that such lien should not be lost or destroyed by his negligence. Waterson did not step forward and redeem the property from sale, but he took the transfer of the tax-certificate, and afterwards got the tax deed. By this action on his part, he was elected to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. In *Chapman* v. *Mull*, 7 Iredell, Eq. 392, it was held that "the principles in relation to dealings between trustee and *cestui que trust* as adopted by courts of equity, do not apply to the case of mortgagor and mortgagee. Dependence and the duty of protection, are not involved in this relation, and they may deal with each other subject only to the ordinary principles, with this difference that the relation is a circumstance which always creates suspicion, and aids in the proof of an allegation of

oppressive and undue advantage, where there is gross inadequacy of price, and other circumstances tending to show fraud. In *Williams* v. *Townsend*, 31 N. Y. 415, Davis, Judge, delivering the opinion of the court said: "A mortgage is a mere security for a debt, and there is no such relation of trust or confidence between the maker and holder of a mortgage, as prevents the latter from acquiring title to its subject under his own or any other valid lien. The defendant had no duty to perform to the plaintiff, or toward the mortgaged premises, that precluded her from buying at the tax-sale. She was under no obligation to pay the taxes. She might pay them or not, as she chose, or she might stand upon her general rights and purchase at the tax-sale, as others could do, and she would take a redeemable interest only." In *Maxfield* v. *Willey*, 46 Mich. 253, however, it was held, that "When a mortgagee, instead of paying taxes due, purchases the land at a tax-sale, the mortgagor can treat the purchase as a payment, and compel the cancellation of the tax-certificate, on refunding the amount paid with interest; but it was further held, that such payment, can not, against the will of the mortgagor, be held a payment in his behalf; and Cooley, Judge, delivering the opinion of the court in that case, said "that when the mortgagee, instead of making payment of the taxes, makes a purchase of the land at the tax-sale, either in his own name or in the name of another person, who has his money for the purpose, we have no doubt of the right of the mortgagor to have the purchase treated as a payment and to compel the cancellation of the tax-certificate, or deed, on refunding the amount paid, with interest. But the right to treat the purchase as a payment is the *right of the mortgagor only*, and rests upon a principle of equity that it is *necessary for his protection.*"

In the case under consideration neither Summers nor his trustee, was in possession of the land; they had entered into no covenant or agreement with Walker or his vendee to pay the taxes on the land; no relation of trust or confidence existed between them; they were dealing with each other at arm's length, and while Summers had the right to pay the taxes on the land to protect his trust-lien, yet there was no legal or moral obligation resting upon him to do so. Under these circumstances

he was not precluded from acquiring at the tax-sale, the title to this land, which had been vested in Walker as his vendee. Until the tax-sale was made, every other person having a right to charge the land with the payment of the debt, had the right to pay the taxes and prevent the sale; and after the sale was made, they still had the period of one year within which they had the right to redeem the land from Hogeman, by refunding to him the amount he had paid for the land and all taxes thereon subsequently paid by him with interest on the same at the rate of twelve *per centum per annum* from the time when he paid the same, but if not so redeemed within that time, the purchaser upon obtaining a deed for the land according to the provisions of said chap. 117 of the Acts of 1872–3 and recording the same in the office of the clerk of the county court of the county in which the land or the greater part thereof was situated, there was vested in him such estate in and to said land so purchased by him, as was at the commencement of, or at any time during the year or years for which the said taxes were assessed, vested in the person assessed with the taxes for which it was sold, and in any other person or persons having title thereto, who has not in his or her own name, been charged on the assessor's book of the proper county or district, with the taxes on said real estate, for the year or years, for the taxes of which it was so sold, and actually paid the same as required by law. "And if, at the time of such sale, the lands sold, be under a mort gage or deed of trust, or there be any other lien or encumbrance thereon, and the mortgagee, trustee, *cestui que trust*, or person holding any such lien or encumbrance shall fail to redeem the same within the time prescribed by sec. 15 of said chap. 117, then, all the right, title and interest of such mortgagee, trustee, *cestui que trust*, and of the person holding any such lien or encumbrance on the land so sold, and not redeemed, shall pass to, and be vested in such purchaser, and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien or encumbrance." If Summers had paid the taxes on the 160 acres of land, the legal title thereto, would have been preserved to the trustee, and the equity of redemption to Walker, or his vendee; the deed of trust would have remained a valid security for the

trust-debt, and the right to charge the land with the payment of a debt would have been preserved to any one, who had the right to do so. The rights of all persons having mortgages, deeds of trust, liens or incumbrances on the land, and the title of other persons thereto, would have been preserved to them, although they may have been so unfortunate as "not to have had the said land in their own name, charged on the assessor's book of the proper county, or district, with the taxes on the said land for the year or years, for the taxes of which the same was so sold, and *actually paid the same* as required by law." The same beneficial results would have followed, it, at any time after the sale was made, and before the time for the redemption thereof had expired, Summers had redeemed the land from said Hogeman. But when the title to said land became absolute in Hogeman, by obtaining and recording his tax-deed for the land, he stood invested with such estate in, and to said land, as, at the commencement of, or at any time during the year 1873, was vested in the said J. Brisben Walker, or in The West Charleston Extension Company, or in the trustee, W. S. Laidley, or in the said Summers, or "in any other person having title to said land who had not had the same entered on the said assessor's book in his own name, and assessed with the taxes thereon for the year 1873, and actually paid the same as required by law," free from all other mortgages, trusts, liens, and incumbrances thereon. Thus, it will be perceived at a glance, that between the payment of the taxes, or a redemption of the land, and the purchase thereof, at a tax-sale for the non-payment of the taxes, there is an immense advantage in favor of a purchase at such sale, because such a purchase, once made, and become absolute, all these statutory advantages incident thereto, attach to, and are inseparable from it. We are therefore of opinion, that when the purchase made by Hogeman of the 160 acres of land became absolute in him, he took the land free from the deed of trust and from the equity of redemption, unimpaired by the lien created thereon by said deed of trust, and that no title whatever remained in the trustee, Laidley, and hence nothing passed to Summers by the sale and conveyance made to him by said Laidley on February 17, 1877; and that whether said Hogeman made said

purchase in his own name, with his own money, and on his own behalf, or in his own name as the agent and on behalf of the said Summers and with his money, the legal effect and operation of his said purchase and deed were the same. By the deed from Hogeman to Lewis Summers dated November 29, 1879, the tax-title so acquired by him, with all of its incidental advantages and disadvantages passed to and vested in Summers and did not re-vest in said trustee, Laidley. Although the title to said land so acquired by Hogeman, related back to the commencement of the year 1873, and overreached all conveyances of the land thereafter made, and all liens and incumbrances created thereon, it does not follow that for any wrongful act done or injury committed to or upon said land, after the commencement of the year 1873 and before the title of the purchaser at the tax-sale had become absolute whereby the estate of the owner in said land had been rendered less valuable, that a right of action for the recovery of damages for such wrongful act, would pass to him by virtue of his purchase at such tax-sale; nor does it follow, that said Hogeman who at the time the public road was established through said land had only a redeemable interest therein, thereby became or was such owner or tenant of the freehold, as transferred to, or vested in him a right of action against said county, for the value of the right of way over the land so dedicated and given by the owner thereof to the public for the public road, and for damages to the residue of the tract. If such right attached to the purchaser of land at a tax-sale, great public inconvenience would result, for it would follow, that in any case where private property was taken for public use, and the compensation therefor had been ascertained and paid to the owner of the land, and such land should at that time have been assessed with taxes for the non-payment of which the land should be afterwards sold, the purchaser at such sale, would be entitled to compensation for the land so taken, and damages to the residue of the tract, and he would not be barred of his recovery by the previous payment to the owner, because, in such a case, the damages would have been paid to the wrong person, that is, to the owner of the land, and not to the person who subsequently became the purchaser thereof

at the tax-sale. But if it could be held, that Hogeman did in fact acquire such right, by his purchase, it is quite certain that no such right was conveyed to Summers by the deed from Hogeman, and as he did not acquire the same by his purchase and conveyance from the trustee, Laidley, it follows that the plaintiff in error at the time of filing his petition in the county court of Kanawha county was not entitled to demand or receive from said county any compensation or damages for the land alleged to have been taken for said public road; and that he was not entitled to the writ of *ad quod damnum* prayed for in his petition. We are, therefore of opinion, that there was no error in the judgment of the circuit court of Kanawha county, rendered in this cause on May 26, 1880, and the same is therefore affirmed with costs and $30.00 damages.

AFFIRMED.

WHEELING.

KNIGHT, COMMITTEE, &c. *v.* WATTS'S ADM'RS *et al.*

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42 781

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52 565

26 175
62 607

Submitted January 15, 1885.—Decided July 3, 1885.

1. If two executors authorized by the will of their testator to sell a tract of land sell it to one of the executors but convey it to a third party who immediately conveys it to the executor who was the real purchaser, such sale can be avoided at the option of any of the parties, who under the will had an interst in the proceeds of such sale, to the extent of the interest of such devisee so objecting. But such sale and deed is not absolutely void, and the right of any one of the devisees or of all of them may be lost by any facts or circumstances showing that he or they had expressly or impliedly approved such sale under circumstances, that would make such approval a waiver in a court of equity of the right to have such sale and deed set aside. (p. 202.)

2. If a personal representative or other fiduciary fails to make an *ex parte* settlement of his fiduciary accounts once a year, it will be presumed, that such failure arose from the failure of such fiduci-

ry "to furnish a commissioner with a statement of all the money, which he had received or had become chargeable with or had disbursed within six months after the end of the year," and unless this presumption is rebutted by satisfactory evidence, such fiduciary must forfeit his commissions and all other compensation for his services during the year, in which he fails to have made such *ex parte* settlement. (p. 203.)

3. It is true, that delay in the assertion of a right, unless satisfactorily explained, may operate in equity as a waiver of such right, and that *laches* and neglect are always discountenanced by a court of equity. But these principles are inapplicable, when the party, who, it is claimed, has failed to assert his right in a reasonable time, was an infant or one *non compos mentis*, and the suit is brought promptly, after there is some one appointed, upon whom the law imposes the obligations to guard the interest of such infant or lunatic. (p. 206.)

4. To authorize an investment by a fiduciary under an order of a judge in Confederate bonds the act of the Virginia legislature of March 5, 1863, required, that these conditions should concur: First, The money must be in the hands of the fiduciary. Second, It must have been received in the due exercise of his trust. Third, For some cause he must have been unable to pay it out to the party entitled to it. And if in any case they did not all exist, the fiduciary is responsible for the money. (p. 210.)

5. If it was the duty of trustees to invest the funds of their *cestui que trust*, and it was safely invested and secured amply on land, and these trustees were to collect the money so invested in Confederate notes largely depreciated and should re-invest it in Confederate bonds, which became valueless, such trustees would be responsible to the *cestui que trust* for the amount of such money so improperly collected and re-invested. (p. 211.)

6. A testator devised a sixth of his estate to trustees for the use of his grandson, who was an imbecile, his portion to be held by them and the interest expended annually in his support and education, till he should attain the age of twenty-five years. When this grandson attained the age of twenty-two years, these trustees claiming that they had invested the whole of his estate in a Confederate bond, which was not shown to be true, and having furnished no support for more than a year claiming that they owed nothing, his whole estate being lost by its investment in a Confederate bond, entered into an agreement with him, which he had not sufficient mind to fully comprehend, whereby he in effect released them from responsiblity for the amount, which came into their hands, to an extent exceeding $1,000.00. Such agreement ought not to be held binding on him, and his trustees should be

required to settle their accounts, as if no such agreement had been entered into with him. (p. 211.)

7. Without determining upon what principles the accounts of a committee of a lunatic or idiot should generally be settled, yet it is held that under the circumstances of this case stated in the opinion the accounts of such committee ought to be settled on the principles governing the settlement of a guardian's account. (p. 218.)

GREEN, JUDGE, furnishes the following statement of the case:

Michael Bunger died in Greenbrier county, West Virginia, in 1859, leaving real and personal property worth about $20,000.00. By his will he bequeathed his beds, bedsteads and bedding, and his library of books, to his five daughters and to his grandson, William D. Littlepage, a son of a deceased daughter; and he directed that the share of the bedding belonging to this grandson should be in the charge of the testator's daughter, Nancy Kincaid, and that his portion of the library of books should be held by the testator's executors, or by the guardian of the grandchild, till he arrived at the age of twenty-one years. All his other property, real and personal, he directed his executors to sell and the proceeds after the payment of his debts were to be equally divided among five daughters and this infant grandson after first allowing him $150.00, which was the amount he had advanced to each of his daughters. And this will appoints the testator's two sons-in-law, James D. Kincaid and James F. Watts, trustees to hold the sixth part of his estate devised to his grandson, until he should attain the age of twenty-five, the interest of which should be expended annually in his support and education, or so much as may be necessary, and if he should turn out to be a promising and sprightly youth, and his executors upon consultation and advice with the father of this grandson, should deem it desirable and proper to give him a liberal education, the testator desired that the same should be done out of his portion of the estate under the direction of these two trustees; and the testator appointed his said sons-in-law his executors. This will was probated in September, 1859, in the county court of Greenbrier; and these executors qualified as such, and in October, 1860, on the motion of these ex-

ecutors said county court ordered them to settle their executorial accounts before James Withrow, a commissioner. This settlement was not made till January 1, 1862, some two years and a half after the testator's death.

The first item of this *ex parte* account on the debtor side is cash paid by these executors for the estate, October 27, 1859. The amount of payments made by the executors during the first year on October 27, 1860, was by this report, $945.56; and the amount of receipts during this first year, was $6,271.61, which included $4,618.20, the cash payment on lands of testator sold by the executors. The balance in the hands of the executors at the end of first year, October 27, 1860, was $5,326.05. During the second year the executors paid out only $112.17. They received during this year the whole amount of the bill of sale of property made by them, $4,571.29; and the principle of the land-bond for land of testator sold by them, which fell due on October 27, 1860. After allowing their commissions the balance due from the executors by this account as settled by the *ex parte* settlement at the end of the second year, was principle, $13,943.90, and interest $754.10, as of date October 27, 1861. Between that and January 1, 1862, the cash paid by executors and retained to pay all debts was only $30.81. The cash received by the executors was for amount of last payment on land sold, due October 23, 1861, $4,618.20, and cash received from a debtor of the estate, $48.53; and after allowing commissions the balance in their hands on January 1, 1862, was found by this report to be, principal, $18,610.63, and $1,186.60 of interest, and after deducting from this the $150.00 extra, allowed William D. Littlepage by the will and interest on it from October 27, 1860, ($10.50,) left for equal distribution among six devisees, $18,197.47 of principal, and $1,170.12 interest with interest from January 1, 1862, till paid. The total amount of commissions allowed the executors in this account is $1,006.38. This report states, that the executors represent, that all the debts were paid, and that the estate had then been fully administered and was then ready for final settlement. This report was filed March 26, 1862.

On July 13, 1863, these executors of Michael Bunger, deceased, presented a petition to Hon. Robert Hudson, judge of

the circuit court of Greenbrier county, Virginia, in which they state, that William D. Littlepage is about fourteen years of age, and that they have in their hands about $3,100.00 or $3,200.00 to be invested for him, which by the will of Michael Bunger they as executors and trustees were to hold till William D. Littlepage attained the age of twenty-five years, and they asked authority to invest said funds in Confederate State stock or such other stocks as the judge should prefer; and on same day this judge made an order in vacation whereby leave was given these executors to invest the money in their hands in their fiduciary character aforesaid in interest bearing bonds or certificates of the Confenderate States or of the State of Virginia pursuant to the Virginia act of March 5, 1863. On August 4, 1868, these trustees of Wm. D. Littlepage made an *ex parte* settlement of their account as trustee before Alexander Walker, commissioner, to which there were no exceptions filed; and it was confirmed by the recorder of Greenbrier county on January 9, 1869. It showed a balance of interest due to William D. Littlepage of $26.10 in the hands of his trustees James F. Watts and James D. Kincaid on August 4, 1868, when William D Littlepage came of age. On one side of this account was placed in one gross sum, the interest on the principal sum found to be in their hands on January 1, 1862 from that time to August 4, 1868, that is $1,259.38 and also the interest, which was in their hands by the settlement of January 1, 1862, that is $43.00; and on the other side was placed the commission of five per cent on these two sums amounting to $1,302.44, that is $65.12, and all payments these trustees had made for William D. Littlepage, which amounted to $1,214.32. No rests of any sort were made in settling this trustee-account. Of this $1,214.32 there is entered as paid January 1, 1862 $854.32 and $360.00 as of August 4, 1868.

This *ex parte* settlement was made because of a suit, which had been brought in the circuit court of Greenbrier by Wm. D. Littlepage by his father and next friend Lewis P. Littlepage on February 16, 1867, when Wm. D. Littlepage was between the age of nineteen and twenty years of age. This suit was brought simply to compel these trustees to pay out

the interest, which accrued on this principle sum found by the settlement of January 1, 1862 to be in the hands of these trustees, it being claimed, that they would not pay out the same, but that while it was accumulating in the hands of the trustees, accounts for the necessary support of Wm. D. Littlepage were going unpaid. The truth of this was shown by this *ex parte* settlement of August 4, 1868 when Wm. D. Littlepage came of age. It shows that $309.00 was paid out that day by these trustees for him, while nothing had been paid out for him by them for more than six years before that date. They had ceased paying anything out, because they claimed that under this order of the judge of the circuit court of Greenbrier they had invested in the bonds of the Confederate States all of the money of Wm. D. Littlepage in their hands; and that by the result of the war the whole of it both principal and interest had been lost. They filed no answer to this chancery suit, and no steps were taken in the suit, it being dismissed almost immediately after it was brought under an agreement signed by L. P. Littlepage and J. F. Watts dated March 28, 1867 a little over one month after the institution of the suit. This agreement recites, that "Watts and Kincaid, the trustees, are willing, without considering it can be rightfully demanded of them but on the contrary denying that it can be in accordance with law and justice, to pay this interest and such as might accrue up to the time Wm. D. Littlepage arrives at the age of twenty-one years." They accordingly agreed to pay this interest, but without prejudice to their rights thereafter in consideration of this dismissal of this suit, and the *ex parte* settlement made when Wm. D. Littlepage came of age August 4, 1868 shows how this agreement was carried out.

On September 6, 1869, about thirteen months after Wm. D. Littlepage came of age, an agreement was executed by these trustees and by his father and himself, of which the following is a copy:

"Memorandum of an agreement made and entered into this 6th day of September, 1869, between James F. Watts and James D. Kincaid, executors of Michael Bunger, deceased, and trustees (by appointment in said Bunger's will) of Wm. D. Littlepage, of the first part, and Wm. D. Littlepage and

Lewis B. Littlepage, father and next friend of the said Wm. D. Littlepage, of the second part, all of the county of Greenbrier and State of West Virginia:—

"Witnesseth: That, whereas, the said William D. Littlepege was entitled under the provisions of the will of the said Bunger, which share was ascertained by settlement before a commissioner of the late county court to be $3,182.91, and by the will was directed to be held by the executors, as trustees, for the separate use of the said William D. Littlepage until he arrived to the age of twenty-five years, expending the interest annually in his maintenance and education, and whereas the said executors and trustees did in the year —— invest the said amount (or thereabouts) in a bond of the Confederate States for the said William D. Littlepage, which bond is now worthless, the said parties have, and do agree to the following settlement, viz:

"That the said executors shall pay interest on the original amount from the 3d of August, 1868 (the date up to which the interest has been heretofore paid) to the 3d of October, 1869. That at the last mentioned date the original principal sum shall *abate one-third;* that is, instead of $3,182.91 the principal shall be $2,120.94. That on the 3d day of October, 1869, the said executors shall pay to the said William D. Littlepage, or his order, the interest before mentioned, amounting to $224.79, and out of the principal the further sum of $121.74, (total $344.73) thus leaving as of the 3d of October, 1869, the principal sum of $2,000.00, which sum is to remain in the hands of the said executors or trustees until the said William D. Littlepage arrives at the age of twenty-five years, they paying to him the interest thereon annually; and the said parties of the first part hereby agree and bind themselves, their heirs, &c., to pay the said $2,000, with any interest that may be due thereon, to the said William D. Littlepage or his order, so soon as he shall have arrived at the age of twenty-five years. And the said parties of the second part hereby bind themselves that so soon as the said sum of $2,000.00 and interest thereon shall have been paid, as above mentioned, the said William D. Littlepage shall execute to the said parties of the first part a full receipt and discharge from all further liability on account of the distributive share

of the said William D. Littlepage in the estate of said Michael Bunger, deceased, first above mentioned.

"As witness the *hands and seals of the parties* this, the date first above written.

"JAMES F. WATTS, [Seal.]
"JAMES D. KINCAID, [Seal.]
"WM. D. LITTLEPAGE, [Seal.]
"L. B. LITTLEPAGE, [Seal.]

"Teste—JAMES WITHROW,

"As to all four of the parties.

"The $344.73 paid in my presence October, 1869."

William D. Littlepage reached the age of twenty-five on August 4, 1873; but shortly before he attained that age, at the April term 1873, after the examination of witnesses the county court of Greenbrier being satisfied, that he was *non compos mentis*, appointed James F. Watts, who was one of his trustees, a committee to take charge of his person and estate both real and personal, and he qualified as such committee giving the required bond and security. Shortly afterwards, on October 20, 1873, James F. Watts, committee of William D. Littlepage, bought for him a tract of land in Greenbrier county of his former co-trustee, James D. Kincaid, containing 115 acres paying therefor $1,550.00; and a deed was then executed conveying said land to James F. Watts as such committee. This tract of land was subsequently, on October 24, 1881, sold and conveyed by him as such committee to Mary C. Gabbert for $1,212.00, of which $612.00 was to be paid in cash and the residue in five years thereafter with interest from date to be paid annually. This $612.00 was then invested by James F. Watts in the purchase of another tract of land in said county of Joseph H. Holcomb; and on November 8, 1881, Holcomb and wife conveyed this tract of land containing 93¾ acres, to James F. Watts committee of William D. Littlepage. This deed was recorded in the office of the clerk of the county court of Greenbrier.

On April 18, 1882, James Knight, sheriff of Greenbrier county was appointed the committee to take charge of the estate and person of Wm. D. Littlepage, in the place of James F. Watts, deceased; and on the first Monday

in June, 1882, he brought this chancery suit in the circuit court of Greenbrier county, as committee of Wm. D. Littlepage, against A. B. Watts and R. W. Hill, administrators of James F. Watts, deceased, James Knight, administrator *de bonis non*, with the will annexed of James D. Kincaid and his widow, children, devisees and legatees and also the widow and children of James F. Watts, deceased, they being his heirs and distributees. This bill states all of the above facts and surcharges and falsifies the *ex parte* settlement made by a commissioner of the county court on January 1, 1862, hereinbefore set out. The error stated to exist in this account was, "the commissioner had therein charged the estate or credited the executors with the commission on their receipts aggregating the sum of $1,006.38, and which the said executors had no right to claim whatever in consequence of their failure to settle annually, and conseqnently the amount in favor of said Littlepage, as of January 1, 1862, should have been more by nearly $200.00, than the sum actually reported." The bill also surcharges and falsifies the settlement of August 4, 1868, and alleges the following errors to exist in it:

"First. The account is not stated annually from year to year with annual rests, as should have been done, but the transactions for the whole time, some six or seven years, are thrown together from January 1, 1862, to August 4, 1868, the time included in said settlement.

"Second. The account is not stated as it should have been, that is, as a guardian account with the interest of each year in excess of the disbursements added to the principal and made an interest bearing fund, but it is stated as an administration or executorial account with the exception that it is not stated, as noted above, from year to year with annual rests.

"Third. The trustees are allowed commission on the balance of interest brought over from their executorial account.

"Fourth. They are allowed commission upon the large amount of interest which came into their hands from January 1, 1862, to August 4, 1868.

"Fifth. The account is erroneous in that it allows the said trustees any commission at all; for even if they were entitled

to commission ordinarily upon interest collected, they had lost and forfeited all such right by their failure to make annual settlement as the law requires.

"Sixth. The trustees are not charged with and render no account of the beds, bedding, &c., bequeathed to their said *cestue que trust* or ward, and,

"Seventh. They are not charged and render no account of his interest in the 'library books' of the said testator."

The bill also surcharges and falsifies the *ex parte* settlement of James F. Watts, trustee and committee of Wm. D. Littlepage, of date January 28, 1876. The errors assigned in this settlement, are as follows:

"First. The account is not stated from year to year with annual rests as the law requires.

"Second. It is not stated, as should have been done, upon the principle of an account between guardian and ward.

"Third. It is erroneous in allowing the committee commissions upon a balance of interest on hand and brought over from his account as trustee when settled by Walker.

"Fourth. It is erroneous in allowing commission upon the interest accrued during the time covered by this settlement.

"Fifth. It is erroneous in allowing commissions upon the sum which the commissioner is pleased to style the 'principal;' this sum was in the hands of the committee when acting as trustee, and is only brought forward in this new account; was not collected by him, and upon it he is entitled to no commissions. The committee admitted to the commissioner (see report) that he had had the whole fund in his hands all the time and that Kincaid, his co-trustee, was in no way responsible except as a surety.

"Sixth. It is erroneous in allowing any commissions at all on any sum, as the committee or trustee by his failure to make annual settlements had forfeited his right to the same.

"Seventh. It is erroneous in allowing the committee credit for the item of $344.73 paid over to Littlepage in person on October 4, 1869. (See voucher four with report and what is said above as to this item when speaking of the "closing executorial" account of March 12, 1870, and which is here reiterated.)

"Eighth. It is erroneous in allowing the committee credit

or an abatement for $1,060.97 as of October 4, 1869, by reason of an alleged investment in Confederate bonds and a pretended agreement between the trustees and Littlepage and his father as *next* friend. (See as to this error what is said above in speaking of it in connection with the "closing executorial" settlement of March 12, 1870, and which is here reported.)

"Ninth. It is erroneous in that it allows the committee credit for $1,550, the price of a tract of land said to have been bought by him for Littlepage as of October 24, 1873; this land the plaintiff alleges was bought without any right or authority on the part of said committee so to do, at a most unreasonable and exhorbitant price; was bought from Kincaid, a co-trustee, and was only bought to enable him to account for and make good a large amount due from him to the trust fund and to relieve himself from liability therefor, and—

"Tenth. It is erroneous in not charging the committee with the rents and profits of the land thus bought, and in utterly disregarding and taking no account of said rents whatever.

"Eleventh. Said account is erroneous in crediting the committee with a large number of disbursements, whereby he expended a large part of the *principal* of the fund in his hands improperly and without any authority."

The bill then proceeds as follows:

"The plaintiff also alleges that some seven or eight years after said land was purchased, the said Watts, without any power or authority so to do, without any application to the court or any direction from it, sold said real estate at a great loss and sacrifice, only getting therefor some $1,212.00, although it cost the estate of said Littlepage $1,550.00 as above mentioned, and for this loss and sacrifice the plaintiff is advised and charges the estate of said Watts, committee, and his sureties on his bond as such, are liable.

"And further the plaintiff is informed, believes and charges that the said Watts, committee as aforesaid, well knowing of course the mental infirmity and imbecility of said Littlepage, and his consequent inability to manage and control his property properly, utterly failed and neglected to manage and con-

trol the same or even to supervise its management, but left the whole control and management without any action or interest on his part to said Littlepage himself, by which cause the said property and estate were grossly mismanaged, squandered and almost entirely lost. And for this loss the plaintiff is advised and charges the estate of said Watts and his sureties on his bond as committee are liable.

"The plaintiff further represents that these matters would have been seen to and the relief now asked would have been sought sooner, but the persons against whom it is asked were themselves, the executors of Bunger and the trustees and committee for Littlepage, and were alone authorized to act for him, and of course would not do so to their own loss and injury; that the said Littlepage as already stated is and always has been "*non compos mentis*" and powerless to act for himself. And the plaintiff is advised that under the circumstances he can not be barred of his remedy and relief by any statute of limitations and can not be prejudiced by the lapse of time."

The prayer of this bill is as follows:

"In consideration of the premises, the plaintiff prays that the parties named as such in the caption may be made parties-defendant to this bill and required to answer the same fully; that the defendants, the administrators of James D. Kincaid and of James F. Watts, may be required, before one of the commissioners of the court, to make a statement and settlement of the transactions of their said intestates as executors of the will of Michael Bunger, deceased, showing what assets came to their hands, and what disbursements were by them made, at least so far as necessary to show the amount that was due from them to W. D. Littlepage as a legatee in said will or his trustees, and also to make a statement and settlement of the transactions of their interests as the trustees of said Littlepage appointed by said will; that the said administrators of James F. Watts may be required before said commissioners to make a statement and settlement of the transactions of their said intestate as committee for said Littlepage, and that they be also required to render an account of their own transactions as administrators upon the estate of their said intestate, showing what assets have come or should have come to their hands, what disbursements have been by

them made, and what balance, if any, is due to or from his said estate; that upon the taking of said accounts the said plaintiff may have lieve to surcharge and falsify the executorial account of January, 1862, the trustee account of November, 1868, the executorial account of March 12, 1870, and the trustee and committee account of January, 1876, in the foregoing bill mentioned as to the alleged errors and matters therein stated and pointed out, and as to such other matters as may be by him brought to the attention of said commissioner; that the so-called closing executorial account of March 12, 1870, in said bill mentioned, may, as to himself as committee for said Littlepage and as to said Littlepage, be amended, set aside, and held for naught; that for such an amount as may appear, upon such settlement, by said commissioner, to be due him, he may have a decree against the estates of the said James F. Watts, James D. Kincaid, and against the said sureties of said Watts as committee, jointly or severally as they may be liable; that the creditors of said Watts may be convened and required to prove their debts before said commissioner in the manner prescribed by law. And that he may have all other further, general and complete relief."

The infant children of James F. Watts by their guardian *ad litem*, filed their answer, a formal one, to the bill, which was replied to generally. His administrators also filed their answers. They deny that their intestate was responsible for the beds, &c., and library which the will specifically bequeathed, and which never came into the hands of the executor, and say that the library consisted of only five religious books and pictorial histories and patent office reports worth a few dollars at most. They deny that William D. Littlepage was ever an idiot, though he was always of weak intellect they admit, yet he had capacity enough to marry and raise children and to manage his farm and to attend to his affairs generally in many matters exhibiting, they say, much shrewdness and good judgment, though on account of his weak intellect he could not manage his estate prudently and therefore his relatives had a committee appointed for him in 1873. They claim that there has been gross *laches* in the institution of this suit, and that by reason of the statute of limi-

tations and the rules governing courts of equity no relief can be granted the plaintiff after the death of parties fully cognizant of the facts; and they set up this as a bar to the plaintiff's claim. They claim that it was the custom of commissioner Withrow, who made the settlement of the accounts of the executors of Michael Bunger up to January 1, 1862, to make up the settlement not when vouchers were filed by the executors, but he often retained them till long after the expiration of the year, in which they were filed, if by so doing he could make up substantially a final settlement of the estate; and that their intestate filed their vouchers before this commissioner in proper time, and he delayed the settlement in order to make substantially a final settlement, and in it he therefore properly allowed the commissioners their full commissions. They say that "the balance found to be in the hands of the executors of Michael Bunger, January 1, 1862, due to William D. Littlepage was made up in part of Confederate money and in the vicissitudes of the times—owing to the moral compulsion to take Confederate money and the inability of the parties to make satisfactory investments in good paying securities—it all soon passed into that currency. Under these circumstances the executors made the application to Judge R. M. Hudson for leave to invest said funds in Confederate bonds, and by his leave said investment was made accordingly, but the Confederate bonds by the result of the war became utterly worthless."

Their answers further say, that these executors refused therefore to account for this fund or its interest, and the suit aforesaid was brought by Wm. D. Littlepage by his father and next friend, which was compromised, so far as the interest was concerned, as hereinbefore stated; and that Wm. D. Littlepage though then an infant knew of this and consented to it; that in accordance with this settlement the commissioner made the settlement of November 1868; that a change in the decision of the court having been made or foreshadowed, the parties made the final settlement before referred to of September 6, 1869. They also say that this suit was purposely kept on the docket till after September 6, 1869, and then dismissed; that shortly afterwards commissioner Withrow made his final *ex parte* settlement which

was in accordance with these agreements. They deny "that the purchase by James F. Watts of the tract of land for $1,550.00 was without right or authority on his part as committee so to do. They admit that it was afterwards sold for $1,212.00, but this was done at the urgent request of W. D. Littlepage and his wife." It was necessary to sell this land for the support of Wm. D. Littlepage. And these answers conclude as follows: "Respondents say, that said Watts gave such superintendence to said lands and affairs of said Wm. D. Littlepage, as they needed, for nothing more was needed than to guard him against improvidence. The said Littlepage being abundantly able to take care of himself in at least all minor affairs, such as the control and management of his land, and that said Littlepage received the full benefit of the use and profits of said lands, and no part thereof was either lost, misapplied or squandered, as alleged."

These answers were replied to generally. Many depositions were taken and with the exhibits filed in the cause. They proved the facts hereinbefore stated as existing prior to the filing of the bill in this cause. They proved also, that the bed, bedding and library of books were divided, as directed by the will, and the portions left to Wm. D. Littlepage were left to his aunt, Nancy Kincaid, and at Wm. D. Littlepage arriving at twenty-one years of age delivered to him. She was the wife of James D. Kincaid, who was one of the executors of Michael Bunger. Commissioner Withrow proves, that he did, as stated in the answer, frequently retain vouchers filed with him by executors for a considerable time, and if filed within the proper time he frequently retained them without making a settlement within the time required by law, if by so retaining them he could make one final settlement of the whole estate at the end of two years. He says that in this cause "he is unable to say that the executors of Michael Bunger did file their papers before him before the expiration of eighteen months, but he was inclined to think they did, because one of the executors did consult him a great deal about the estate, and he frequently prepared papers for him." But he further stated that he had no recollection of these papers being filed by these excutors

within the eighteen months; and that he acted as commissioner during the late war, and that the county court of Greenbrier frequently sat during the war. It was proven that Wm. D. Littlepage was married in 1871 or 1872, when he was twenty-four or twenty-five years of age, and when this suit was instituted, he had four or five children. He was about nine years old when his grandfather Michael Bunger wrote his will. He was born August 4, 1847. When at school he was very dull. He tried to study reading, spelling, writing and arithmetic but he made a very poor out in studying them. He was put into geography but he could not learn it and he gave it up. His mind did not improve any as he grew old. It always remained about the same. He was contrary; his speech and manners singular; he stammered and laughed a great deal. When a boy he engaged in sports with other boys. He was a soldier in the Confederate army. He did attend afterwards generally to the business on his farm such as having fences put up and buying calves and the like. He in such matters traded and did business of this sort as well as others, though he was sometimes loose in such business transactions. He was not an idiot but was a boy and man of weak mind; and though the evidence is to some extent contradictory, yet the weight of the evidence is, that he did not have sufficient strength of mind to transact any business of much importance. His wife was not satisfied to live on the tract of 115 acres which his committee, Watts, first bought for him, and because of this he sold it and bought the second farm. His committee bought this 115 acres at a fair price and afterwards sold it at a fair price. He got less for it than he gave for it, partly because it had depreciated in value under the management of Wm. D. Littlepage, and partly because there had been a general depreciation in value of land in Greenbrier county. The committee, Watts, gave but a reasonable price in the opinion of the witnesses for the second tract of land. Watts was solicited by Wm. D. Littlepage and by his father to quality as the committee; and upon testimony taken before the county court of Greenbrier that court appointed him such committee. Commissioner Withrow was one of the witnesses on whose testimony Watts was appointed the commit-

tee of W. D. Littlepage. The agreement signed by the executors of Michael Bunger and by the father of Wm. D. Littlepage and by him, dated September 6, 1869, when he was about twenty-two years of age was witnessed by James Withrow, the commissioner, who states that this compromise and its terms were principally made by Wm. D. Littlepage's father, but Wm. D. Littlepage participated in it to some extent, but he can not remember to what extent. He talked about it some; but his father was the principal negotiator on his side.

A decree was entered on June 29, 1882, referring the cause to a commissioner, with instructions to take, state and report the following matters and accounts, viz.:

"First. A statement and settlement of the transactions of James F. Watts and James D. Kincaid, as executors of the will of Michael Bunger, showing what assets came or should have come to their hands, and what disbursements were by them made, at least so far as may be necessary to ascertain and show the amounts to which Wm. D. Littlepage was entitled as a legatee under said will.

"Second. A statement and settlement of an account of the transactions of James F. Watts and James D. Kincaid, as trustees appointed by said will for said Littlepage.

"Third. A statement and settlement of an account of the transaction of James F. Watts, as committee for said Littlepage.

And leave was given the plaintiff to surcharge and falsify the *ex parte* settlement in the bill mentioned, of the executorial account of January, 1862, the trustee account of November, 1868, and the trustee and committee account of January, 1876, and the executorial account of March 12, 1870, as to the matters and errors alleged and pointed out, and as to such other matters as may by him be brought to the attention of your commissioner, and

"Fourth. An account and settlement of the transactions of the defendants, A. B. Watts and R. W. Hill, as admisistrators of James F. Watts, showing what assets have come or should have come into their hands, what disbursements have been by them made, and what balance, if any, is due to or from said estate; and

"Fifth. Any other matter deemed pertinent by your commissioner, or required by any party to be specially stated."

On April 9, 1883, commissioner McWhorter made his report, and in it after reviewing the facts proven, he reaches the following conclusions:

"First.—On the question of allowing the executors of M. Bunger commission on the amount received, your commissioner is disposed to allow the executors their commission for the reason stated; that it was probably more the fault of the commissioner than of the executors that the annual settlements were not made. The executors started the matter in time by having the same referred to a commissioner for settlement. The commissioner cannot say but what their papers were placed in his hands at the proper time to save their commissions, and the executors are both dead, so they can make no statement in regard to it.

"(There is one further settlement not yet referred to styled the 'closing executorial settlement.' The settlement of 1862 was a final settlement. So your commissioner is unable to exactly understand its object, unless it is to show how the executors stood as to some of the legatees mentioned.)

"Second.—As to the investment of the fund of their *cestui que trust* by the trustees, and the subsequent agreement between Littlepage after he became of age, and with his father as his next friend, and the trustees, is a question of importance.

"This fund for Wm. D. Littlepage arose principally from the sale of the land of his grandfather, purchased by one of the executors and a trustee, and when the purchase-money became due it was but Watts, the purchaser, paying it to Watts, the trustee. All within one person. When due, the money had the full or par value of gold. It is not probable, at all, that when due, the money was set apart and kept in kind for the *cestui que trust.* When the money, circulating as a medium of currency, had so depreciated in value as that a dollar was worth only 1-10 of a dollar per face value, and, consequently, very abundant, the trustees petitioned the court to allow them to fund it in Confederate bonds, and an order was made granting leave to thus invest it.

"A court of conscience can not sanction such a course.

Under the decisions in 25 Grat., *Crickard's executors* v. *Crickard's legatees*, and in 14 W. Va., *McClure, Adm'r* v. *Johnson et al.*, which are nearly parallel cases to the one under consideration, the investment was not sustained, and in the latter case in the syllabus the quere is raised: 'Can an investment in Confederate bonds by a fiduciary be upheld under any circumstances.' Were there no other complication connected with this case but the question of investment, under the authorities cited, there would be no difficulty in deciding it. But after the young man attained his majority, and with the counsel and advice of his father, as his next friend, he entered into a contract abating one-third of the principal. The trustees were to keep the fund four years longer, before he could be permitted to have his money, and by that time, under an examination by the county court, he was adjudged *non compos mentis*. The proof, by deposition of witnesses, shows that at the time the court determined his condition, he was in no worse condition, mentally, than he had been from the time he was grown. And, indeed, there was no necessity of bringing the matter before the court to determine his condition prior to this, for his funds were in the hands of trustees, who were directed how to use it by the will of the testator, M. Bunger.

"A query arises here in the mind of your commissioner, viz: This fund being in the hands of trustees, under directions how to apply it or the proceeds of it, could the young man, even if his sanity was unquestioned, make any contract in reference to the disposition of the principal.

"His father, as his next friend, could not, in a legal sense, make any disposition of it. His action might affect the moral aspect of the case, but no further.

"Defendant's counsel refer as authority of law to 'Ordromax on judicial aspects of insanity'—pp. 317, 318, 319, 320, 331 and 332—now ignore the query suggested above, and say that the young man was entitled to the possession of his money when he entered into the contract of 1869. Even were there no doubts as to his sanity, was not the relation of the parties such that upon application to a court of conscience, the plaintiff on the ground of being overreached in the transaction might reasonably ask to have the contract set aside and

annulled. The first passage of law, referred to above, page 317, is specially applicable to the plaintiff's case. The paragraph is quoted at length:—

"'These are cases of peculiar hardship, when a court of equity will set aside an improvident agreement made by a person in whom the mind and memory are so impaired as to justify this protection *quoad hoc*, and yet when the court would not have the power to deprive such person of the right to the possession and control of his property, on the supposition that he was a person of unsound mind.' And this is added: 'But irrespective of fraud and an unconscionable bargain, mere weakness and partial incapacity, will not afford ground for the interposition of courts.'

"'And it has been held that a conveyance by one, whose mind without being actually unsound, is yet impaired, will not be set aside when the consideration was fair, and no fraud practiced.'

"This shows that courts of equity will set aside improvident contracts in peculiar cases, when the state of the mind would not authorize the court to appoint a committee for the party, and thus deprive him of the control of his property.

"Now the latter part of the above quoted paragraph is particularly applicable in this case, for in view of the decisions referred to in Grat. and W. Va. Reports:—

"The investment by the fiduciary can not be sanctioned by court, and must be held void. Hence there was over $3,000.00 due the said Littlepage, January 1, 1862. And this contract by which he abates one-third of the amount is without a fair consideration, and therefore unconscionable. Your commissioner can come to no other conclusion than that the abatement should be charged up against the estate of J. F. Watts, deceased.

"As to the credit or payment to William D. Littlepage of $344.73, on October 4, 1869, $222.79 was interest. And it was in the discretion of the trustee, if deemed necessary for the said Littlepage's welfare to pay the same. And to that extent the credit should be allowed. In the settlement of the trustee account in the sum found due January 1, 1869, from that date down to August 4, 1868, when William D. Littlepage became twenty-one years of age, the statement

first made as the proper one is settled on the principle of a guardian account, and it seemed to be the correct principle on which it should be stated. Sec. 10, ch. 82 of the Code seems to warrant the statement. Stating it in that way, and then settling the committee account on the principle of debtor and creditor, allowing of the $344.73 as a credit the interest included therein, and allowing no commission in the trustee account nor the committee account, as such actual settlements as required by the statute were not made, and charging the abatement of one third of the sum found due January 1, 1862, and bringing the account down to April 1, 1883, there is due to the plaintiff, as of that date, $2,963.35. As to the manner of stating the trustee account, settling it on the principle of guardian accounts, your commissioner is not entirely convinced of its correctness. And should the court take the view that it should be run through both accounts as debtor and creditor account, the calculation has been made, and the result placed at the foot of the statement in figures of red ink, showing due the plaintiff of same date $2,417.05. Other statements are made and carried out to meet the views of the respective parties. And each statement headed by an explanation as clear as it is deemed necessary to a proper understanding of the account stated.

"As to the loss on the sale of the land, your commissioner is not disposed to charge that to the estate of Watts, as it may have occurred by reason of a shrinkage in the value of real estate between the dates of the purchase and the sale."

Then follows a statement of what will be due from the executors of Michael Bunger to the committee of William D. Littlepage because of the allowing to these executors commissions in the *ex parte* settlement of January 1, 1862, should it be held they were entitled to no commission because of their delay in making this settlement. The one sixth of these commissions and the interest thereon to April 1, 1883 is shown to be $384.15. Next follows a statement showing the amount due William D. Littlepage's committee by restating the account of April 24, 1869, between James F. Watts and James D. Kincaid, executors and trustees, and William D. Littlepage and settling the same on the rules of settling accounts between guardian and ward, and starting with the

amount, which would have been due, had no commissions been allowed these executors in the first settlement January 1, 1862. This account so stated shows a balance due on August 4, 1868, when William D. Littlepage came of age, of $3,696.22 all principal. The account is then carried on upon the principles laid down by James Withrow, the commissioner, taking this sum of $3,696.22 as a basis and allowing no abatement as per agreement of September 6, 1869, and allowing no credit of $344.73 named in said agreement and paid to William D. Littlepage, and allowing no commission, and giving credit for the purchase of the 115 acres of land for $1,550.00, but charging the committee of William D. Littlepage with the loss on the resale of this land. The balance due to the committee of William D. Littlepage from this account as of April 1, 1873, is $4,922.97; and, if the bond executed to James F. Watts as committee of William D. Littlepage for the purchase of the second tract of land is transferred to the present committee of William D. Littlepage as an investment, said land and interest amounting to $651.70, the balance due James Knight committee of William D. Littlepage as of April 1, 1883 will be $4,271.27.

At the request of the plaintiff's counsel the commissioner made out a statement on the foregoing principles, except that the trustee and committee was not allowed any credit for the price of the 115 acres of land bought of Kincaid for $1,550.00. The balance due the plaintiff by this statement as of April 1, 1883 was $6,113.77; and if this be adopted, the second tract of land purchased for William D. Littlepage and now occupied by him would belong to the estate of James F. Watts, his committee, as also the $600.00 bond due on the sale of the first tract of land. If commissioner Withrow's views in his *ex parte* settlements are adopted, and the account is brought down to April 1, 1883, there will be due to the present committee of William D. Littlepage $34.34. The Commissioner then makes a statement which he regards as just. The following are the principles on which it is based:

"In the first place, for reasons already stated, the executors of Bunger are allowed commissions.

"In the next place, the trustees not having made their annual settlements, are not allowed commission in the settle-

ment of their trustee account, and said account for reasons given is stated on the same principles as guardian accounts are stated. No abatement is made on account of the investment in Confederate bonds. The trustees having been directed by M. Bunger's will to hold the fund in trust until the *cestui que trust* should arrive at twenty-five years of age, the payment of any of the principal before that date was a violation of their trust, unless it had been determined in the manner indicated in the will to educate said beneficiary. Therefore none of the principal which entered into the credit of $344.73 should be allowed as a credit, but only the interest, constituting a part of the said sum, viz.: $222.79 should be credited; and lastly, as the annual accounts or settlements were not made, no commission is allowed."

By this statement the balance due August 4, 1868, when W. D. Littlepage came of age, would be $3,351.60. The account is then carried on upon the principles adopted by James Withrow, commissioner, allowing no abatement for the money funded in Confederate bonds, as per agreement of September 6, 1869, and allowing of the credit of $344.74, paid W. D. Littlepage only such sum as appears to be interest, that is, $222.79. The balance due by this settlement as of April 1, 1883, is $2,963.35, if the $600.00 bond dated October 24, 1881, given by the purchaser Mary D. Gilbert, to James F. Watts, committee of Wm. D. Littlepage, is regarded as belonging now to James Knight as committee of W. D. Littlepage. If the trustees' account was settled on the principle of debtor and creditor accounts, the balance due to the plaintiff, when settled in the same way, instead of $2,963.35, would be as of April 1, 1883, $2,417.05. The settlement of the accounts of A. B. Watts and R. W. Hill, administrator of James F. Watts, shows a balance due then to the estate of $4,363.61. The debts due from the estate of James F. Watts, other than the debts due the committee of Wm. D. Littlepage, are $4,922.54.

Eleven exceptions were filed by the plaintiff's counsel to this report, as follows:

"First.—To the allowance of credit to the executors of Michael Bunger, of commissions on receipts.

"Second.—To the allowance in one of the statements of

commissions to Watts and Kincaid, in the settlement of their accounts as trustees of W. D. Littlepage.

"Third.—To the allowance in the statement of commissions to James F. Watts as committee of W. D. Littlepage.

"Fourth.—To the settlement in certain of the statements of the accounts of James F. Watts as trustee of William D. Littlepage upon the principles of *debtor* and *creditor* instead of upon the principles of *guardian* and *ward*.

" Fifth.—To a like error in the settlement of one of the accounts of James F. Watts as committee of William D. Littlepage.

"Sixth.—To the allowance of James F. Watts committee of a credit of $1,550.00 for land of his co-trustee James D. Kincaid purchased by him for William D. Littlepage.

" Seventh.—If this could at all be allowed then it would be error not to charge this committee with the difference between what he gave for this land and what he sold for without authority.

" Eighth.—In not charging this committee with the rent of this land nor with interest on the amount paid for it and yet allowing credits for disbursements for groceries, store-goods, clothing, potatoes, grain and supplies of every kind bought by him for William D. Littlepage.

" Ninth.—In allowing credit for a large number of disbursements *made by this committee on his own authority* whereby he diminished the *principal* in his hands some $150.00.

"Tenth.—In the allowance to the said committee of the credits of $343.73 or any part thereof paid by him on October 3, 1869, under the agreement of September 6, 1869.

" Eleventh.—To the allowance to the committee or trustees of William D. Littlepage of the abatement of $1,000.00 under this agreement of September 6, 1869, because of alleged investments in Confederate bonds."

The defendants also filed twelve exceptions to this report.

" First.—Because the settled accounts of James F. Watts whether as executor or as committee were *prima facie* correct and could only be surcharged and falsified in the particulars named in the bill and on proof which was never furnished.

" Second.—That the accounts ought not to have been settled on the principles of settling the accounts of *guardian* and

ward, but on the principles applicable to the settlement of executors' accounts till their accounts as executors ought to have been closed, and from that period to August 4, 1873, when W. D. Littlepage arrived at the age of twenty-five, on the principles applicable to trustees, and after that to the death of James F. Watts on the principles applicable to a committee's accounts.

"Third.—Because the commissioner could not pass on the capacity of William D. Littlepage to make the agreement of September 6, 1869, and if he could he and the court should have held it a binding contract.

"Fourth.—Because commissions should at least have been allowed on receipts during latter periods of the war when no settlement could have been made.

"Fifth.—Because annual rests were made throughout almost the entire fiduciary period in years in which there were no receipts or disbursements for no other apparent reason than to compound interest and disallow commissions. And commissions should at any rate have been allowed on receipts for eighteen months prior to each settlement.

"Sixth.—Because the report does not state facts but is an agreement in favor of the plaintiff.

"Seventh.—Because the accounts are brought down to a period subsequent to the death of James F. Watts.

"Eighth.—Because in one of the statements the calculations are brought down to 1868 and the amount thus ascertained carried back to January 1, 1862, and made the basis of the settlement from the last period and the year 1868 is broken into two parts with no apparent purpose than to compound interest again.

"Ninth.—Because one of the statements does not allow the credit for $344.73 paid to William D. Littlepage under the agreement of September 6, 1869, because it charges Watts with the loss resulting from the sale of land bought for William D. Littlepage, and because the $600.00 due on the land for which a bond was in the hands of Watts as committee was not treated as an investment as of the time it was taken but deducted at the end of the account.

"Tenth.—Because in one of the statements Watts is not given credit for investments made by him in land.

"Eleventh.—Because in one of the statements, Watts is not given credit for the $344.73 paid at the time of the settlement of 1869. All of this credit should have been allowed as the payment was made in accordance with the views of the testator declared in the will, and

"Twelfth.—The account which purports to give the results of the accounts if settled on the principle of *debtor* and *creditor* is excepted to because the result given is erroneous."

A reply was made by the plaintiff to each of these exceptions; but as they were only arguments, it is deemed unnecessary to state them. The court on April 26, 1883, rendered the following decree:

"The subpœnas in this cause having been returned executed, and all the defendants, except the infants and the administrators of James F. Watts, still failing to appear and answer the plaintiff's bill as to the defendants not answering is taken for confessed. And this cause having been regularly matured and set down for hearing at rules, came on this day, April 26, 1883, to be heard upon the subpœnas returned executed, and the bill taken for confessed as aforesaid, the answers of the infant defendants, and of the administrators of James F. Watts, deceased, the demurrer and answer of the said administrators to the plaintiff's bill, as amended before appearance on the part of any of the defendants, joinder in said demurrer and general replications to said answers, the interlocutory order entered at the June term, 1882, the report of commissioner McWhorter, made in pursuance of said order, the exceptions to said report by the plaintiff and by the defendants, the administrators of James F. Watts, exhibits filed, depositions and the arguments of counsel. Upon consideration thereof the court is of opinion and decides that the plaintiff, committee for W. D. Littlepage, is entitled to recover from the estate of James F. Watts as the first preferred debt, the sum of $1,919.21 with interest thereon from May 13, 1882, the date of the writ in this suit, which amounts as of April 1, 1883, the time to which the calculations in said report of commissioner McWhorter are conducted to the sum of $2,020.13 and his costs in this suit; that he is also entitled to the bond of $600.00 with its accrued interest, executed by

Gabbart, in payment of the Spring Creek land, and that the investment made by said Watts on the land on Muddy creek, conveyed to him by Holcomb and wife in the proceedings in this cause mentioned, was a proper investment. And that the said plaintiff, committee as aforesaid, should keep and hold said land for the benefit of said Littlepage. And it is therefore adjudged, ordered and decreed accordingly, and that the report of commissioner McWhorter be thus modified and all statements in said report, as well as all exceptions thereto inconsistent with this result, are hereby overruled.

"And it appearing further from said report that the following parties are entitled to recover from the estate of James F. Watts, deceased, as non-preferred debts the following sums respectively, all as of April 1, 1883, viz: Ann Skeen, $688.08; Frank McClung, $417.38; G. W. Price, $108.83; A. B. Watts, $645.00; and that all of said debts, including the amount allowed the plaintiff as aforesaid, amount, as of April 1, 1883, to the sum of $3,879.92, and that there is a personal fund in the hands of the said administrators of said Watts sufficient to pay the same, it is therefore adjudged, ordered and decreed that the general receiver of this court recover from the said administrators of James F. Watts the said sum of $2,020.13 due the plaintiff, with interest thereon from April 1, 1883, and the costs of the plaintiff.

"And that the other said creditors recover from the said defendants, the administrators of James F. Watts, the said sum due them respectively as aforesaid, with interest thereon from April 1, 1883, until paid, their costs in this suit expended. And when the said sum decreed him shall have been collected, the said receiver shall apply the said money to the payment of said costs, and pay out the balance to the plaintiff. And it is further adjudged, ordered and decreed that the said administrators of James F. Watts turn over and surrender to plaintiff the said Gabbert bond with its accrued interest upon his executing and delivering to them a proper receipt therefor, and that the said plaintiff take and hold the said tract of land on Muddy creek for the use and benefit of the said W. D. Littlepage."

From this decree an appeal was allowed to James Knight, committee of W. D. Littlepage, the plaintiff below.

A. F. Mathews, for appellant.

J. W. Harris, for appellees.

GREEN, JUDGE:

The clearest mode of determining the numerous legal questions necessary to be decided in order to determine the decree, which should be entered by this Court in this cause, it seems to me, is to consider in their order the legal errors, which have been committed by James F. Watts and John D. Kincaid as executors of Michael Bunger and as trustees of William D. Littlepage, and also those committed by James F. Watts as committee of William D. Littlepage, and the effect, which such errors ought to have produced in the settlement of the accounts of these executors and trustees and of the said committee.

The first error committed by these executors was made on December 5, 1859, within less than three months after they qualified as such executors, in that they improperly sold to James F. Watts, one of the executors of Michael Bunger, deceased, a tract of land of 774 acres in Greenbrier county for the sum of $13,854.60. By the will the executors were directed to sell this tract of land. But they committed an obvious breach of their trust as executors, when they sold it to one of themselves. No person can consistently occupy the two positions of seller and purchaser. Of course the fact that they as executors of Michael Bunger conveyed this tract of land to one Samuel B. McClintic, who on the same day conveyed it to James F. Watts, one of the executors, does not in the least degree change the case. For it is admitted that James F. Watts, one of the executors, was the purchaser, and that it was conveyed to Samuel D. McClintic and by him to James F. Watts as a mode of transferring the title from the executors to James F. Watts one of the executors. Their mode of transacting this business only shows, that they were unconscious that they were doing any wrong or committing any breach of trust in selling a farm of their intestate to one of their own number. But that it was a breach of trust is indisputable. In the case of *Newcomb, et al* v. *Brooks, et al*, 16 W. Va. 33 point 7 of syllabus, this Court decided: "When there are several fiduciaries one can not purchase of

the others, but such a purchase can be avoided at the option of the parties to whom such fiduciary relation is held. Any one of the persons, to whom such fiduciary relation is held may avoid such a purchase so far as his interest is concerned, though all the others standing in the same relation to the fiduciaries are content that the same shall stand." On pages 70 and 71 very many authorities are cited to sustain this proposition, and it must be regarded as unquestionably law.

Any one of the children of Michael Bunger had a perfect right, had he or she chosen, to have this sale set aside, so far as his or her interest in the land was concerned, and so had Wm. D. Littlepage his grandson or his committee; but none of them have chosen to do so, and the sale was not void but only voidable. The bill in this cause does not ask to have this sale, so far as the interest of Wm. D. Littlepage in the land is concerned, set aside, but on the contrary it is throughout the pleadings and all the proceedings in this cause treated as a valid sale. It must therefore be regarded as such; and this error of the executors of Michael Bunger can therefore have no effect upon any of the settlements of the accounts of any of the fiduciaries in this cause. The next error committed by the executors of Michael Bunger is, that they did not comply with the law which required them "to furnish a statement of all the money, which they had received or become chargeable with or had disbursed within one year from the date of the order conferring their authority or within any succeeding year together with the vouchers for such disbursements within six months after the end of every such year to a commissioner of the court wherein the order was made conferring their authority." (Code of Virginia ch. 132 sec. 7.) And the law fixed a penalty for a failure to perform their duty in this respect, the penalty being if they "should wholly fail to lay before such commissioner a statement of receipts for any year within six months after its expiration, they should have no compensation whatever for their services during said year" with certain exceptions not necessary to be stated, as they have no application to the case we are considering. (Code of Virginia ch. 132 sec. 8.)

It is claimed however by the appellee's counsel that the

executors of Michael Bunger did not fail for eighteen months, after they qualified as such, that is after the September term 1859 of the county court of Greenbrier, to produce their vouchers before a commissioner of said court for a settlement of their executorial accounts; and this is supposed to be shown first by the fact, that about thirteen months after they qualified these executors caused on their motion the county court of Greenbrier to make the order of October 22, 1860, directing their executorial accounts to be referred to James Withrow commissioner for settlement, and that it is reasonable to suppose, that they produced their vouchers before him for settlement within five months thereafter, especially as he testified that he was in the habit, even when the vouchers of a personal representative were produced before him within six months after the expiration of the first year, of postponing the settlement for two years after the qualification of the personal representative, if he thought a full and final settlement could then be made—and he was inclined to think that was done in this case, but this opinion was based on no recollection of this as a fact but simply on his habit in such cases and on the fact, that one of the executors, he remembers, frequently consulted him about the estate.

On the other hand it appears, that commissioner Withrow's first report was not made till after January 1, 1862, that is, till more than twenty-seven months after these executors qualified, and in his report it does not appear, when he commenced the settlement of this account, or when the executors first laid before him their vouchers for such settlement. Under these circumstances under the statute-law above referred to these executors would be entitled to no compensation for any services rendered during the first year after they qualified, that is, before some time probably about September 22, 1860.

The account shows, that the whole amount received by the executors during this first year was $6,271.61, the commission on which at five per cent. was $313.58 which ought not to have been allowed these executors, it having been forfeited under the statute above quoted. But commissioner Withrow properly allowed the executors their commissions for the second year and for three months thereafter up to January 1, 1862, as their vouchers, on which this first settlement was

based, must have been filed with the commissioner within less than six months after the close of the second year, for the settlement was completed before that time. Commissioner McWhorter in the settlement made in this cause allowed these executors commission not only for the second year but for the first year also, because, he says, "it was probably more the fault of commissioner Withrow than of the executors, that the annual settlements were not made. The executors stated the matter in time by having the same referred to a commissioner for settlement. The commissioner can not now say but that their papers were placed in the hands of commissioner Withrow at the proper time to save their commissions, and the executors are both dead, so that they can make no statement in regard to it."

In this he erred. It was the object of secs. 7 and 8 of ch. 132 of the Code of Virginia to have an *ex parte* settlement of the accounts of fiduciaries made once a year. If such settlement once a year was not made, and it resulted from the failure of the fiduciary "to furnish a commissioner with a statement of all the money, which he had received or become chargeable with or had disbursed within one year from the date of the order confirming his authority, within six months after the end of the year, then he is to have no compensation whatever for his services during this past year." If no such settlement is made as required, the presumption must be, that it arose from the failure of the fiduciary to furnish in proper time this statement and his vouchers, and he must show satisfactorily, that he did in fact furnish such statement and vouchers to the commissioner. If he shows this, the failure of the commissioner to make up and return his settlement till after the expiration of the second year would under these sections of the Code of Virginia not forfeit his commission. But unless he does show, that he furnished this statement and his vouchers within eighteen months, then he forfeits his commissions on the amounts received during the past year.

Did the executors of Michael Bunger show satisfactorily, that they furnished this statement and their vouchers to commissioner Withrow within eighteen months after they qualified? It seems to me they did not. It is true, they had

had an order made by the county court of Greenbrier county, at the October term, 1864, directing them to settle their accounts before commissioner Withrow. This order was made only thirteen months after they qualified. But it seems to me to furnish but very weak evidence, that they submitted their vouchers to commissioner Withrow within eighteen months after they qualified. There was no sort of necessity for the making of any such order. They could as well have submitted their vouchers to commissioner Withrow for settlement without having such an order made as after the making of it; and the obtaining of this unless order can have certainly very little weight in deciding, when in point of fact they did submit their vouchers to commissioner Withrow. The only other evidence tending in any degree to show, that in point of fact they submitted their vouchers to commissioner Withrow within eighteen months after their qualification as such executors, is that of commissioner Withrow, who testifies, that he has no recollection, when it was done, but thinks it probable, it was done in proper time, as one of them frequently asked his advice, and he was in the habit, when vouchers were submitted to him in proper time, to put off the settling of the accounts until the expiration of the second year, if by so doing he could make one final settlement instead of two settlements. This, it seems to me, is insufficient to prove, that these vouchers were produced before him within eighteen months after the qualification of these executors. All that it proves is, that perhaps they were and perhaps they were not; and as the burden of proving, that they were, was on the executors, they have failed to meet this burden, and the commissions on their receipts for the first year were forfeited and ought not to have been allowed to them.

Under the circumstances of this case I attach but little importance in reaching a conclusion on this point to the fact, that this suit was not instituted till more than twenty years after the settlement of the *ex parte* account by the executors and until after the death of both of the executors. It is true that delay in the assertion of a right, unless satisfactorily explained, operates in equity as evidence of assent, acquiescence or waiver; and *laches* and neglect are always discountenanced

by a court of equity. (*Trader* v. *Jarvis*, 23 W. Va. 108; *Pusey* v. *Gardner*, 21 W. Va. 469; *Doggett* v. *Helmn*, 17 Grat. 96.) Now, while it is true, that a suit could have been brought at any time by the next friend of Littlepage to surcharge and falsify this *ex parte* settlement of the executors because of the allowance of this commission, (*Bird's Committee* v. *Bird*, 21 Grat. 712,) yet an infant or lunatic ought not to be prejudiced because of the failure of a next friend to institute such a suit, if such suit is brought promptly after there is some one, upon whom the law imposes the obligation to guard the interest of the infant or lunatic. In this cause the suit was brought promptly after the appointment of the plaintiff as committee of William D. Littlepage. These facts account satisfactorily for the delay in the institution of this suit.

The amount of the commissions improperly allowed the executors was $313.58, and the interest on this from the close of the first year, October 27, 1860 till January 1, 1862, when the executorial account was finally closed, is $12.75, making the error in this first account of commissions in favor of the executors $326.33. And as William D. Littlepage was entitled to one sixth of this amount, the true amount due him on January 1, 1862, by these executors principal and interest was $3,442.82 instead of $3,388.43, according to the account of the commissioner. From this is to be deducted the amount paid out for the tuition and other expenses of Littlepage up to January 1, 1862, amounting to $162.46, leaving a balance of $3,280.36 as the true amount, which on January 1, 1862 went in to the hands of James F. Watts and J. D. Kincaid as trustees of W. D. Littlepage.

In making this statement I have corrected no error in commissioner Withrow's account except the improper allowance of commissions to the executors, as no other error was insisted on in the argument of counsel. The other errors claimed in the petition were trifling in amount, (if they really were errors, which they were not. It was no error in commissioner Withrow not to charge these executors with the beds, bedsteads, bedding and library mentioned in the will.) They were bequeathed by the will to testator's daughters and William D. Littlepage; and the evidence shows, that Wil-

liam D. Littlepage received in kind his one sixth of these articles. These trustees of Littlepage having in their hands this sum of $3,280.36 on January 1, 1862, instead of making annual settlement before a commissioner, as required by law, made no settlement at all till August 4, 1868, when Littlepage arrived at the age of twenty-one years. On the principles we have laid down they were entitled to no commissions in this settlement made before commissioner Walker, except a commission of 5 per cent. on the interest received by them shortly prior to August 4, 1868. This amount does not distinctly appear, but we may assume it to have been interest on the sum of $3,280.36, which was in their hands, for the year 1867 and up to August 4, 1868, a little over nineteen months, or $14.02 instead of $65.12, the amount of commissions allowed them by commissioner Walker. In allowing this commission for receipt of interest from January 1, 1877, I assume that these trustees presented their vouchers to the commissioner within eighteen months after January 1, 1867, that is before July 1, 1868, which is in a high degree probable, as the account was closed about a month after that time.

This account shows, that these trustees between January 1, 1862, and August 4, 1868, that is, for five years and seven months, spent for the education and maintainance of William D. Littlepage including commissioner's fees for settling the accounts $13.75 and taxes, which amounted to $58.22, $1,208.22. The interest on the funds in the hands of the trustees amounted during this time to $1,286.82. So that the interest on the funds in the hands of the trustees just about compensates the trustees and pays for the tuition and maintenance of Littlepage leaving his principal undiminished. The true balance in the hands of these trustees on August 4, 1868 was the original principal sum, which came into their hands January 1, 1862, that is, $3,280.36 and $93.64 of interest. Commissioner Walker reports the amount in their hands at that time as $26.00. The difference is to be accounted for by the fact that commissioner Walker allowed, as I have shown, too much commission to the trustees by $40.20, and did not charge them with sufficient interest, having charged them with the interest on $3,182.91 only, which was the principal in the hands of the executors for Littlepage, when their exe-

cutorial accounts were closed, January 1, 1862. But there was in the hands of these executors for Littlepage $43.06 interest, and when it passed from these executors to them as trustees, all of it should be regarded as principal; and therefore the true amount of principal in their hands was even according to commissioner Withrow's account $43.00 more than commissioner Walker calculated interest upon. But I have shown, that there was an error in commissioner Withrow's account arising from allowing the executors too much commission, and that the true balance against them in favor of Littlepage was $3,280.36. Calculating the interest on this instead of on $3,182.91, as commissioner Walker did, would make a difference in the interest charged against these trustees of $27.44.

On September 6, 1869, these trustees and William D. Littlepage and his father L. B. Littlepage executed an agreement under their hands and seals, which was regarded by commissioner Withrow as binding on the parties in the next settlement of James F. Watts as trustee and committee of William D. Littlepage, of date January 28, 1876. Did he err in treating this agreement as binding? On July 13, 1863, James F. Watts and James D. Kincaid, executors of Michael Bunger, presented an *ex parte* petition to Robert Hudson, the judge of Greenbrier county, Virginia. In this petition they simply set out that Michael Bunger by his will had appointed them executors of his will and also trustees for Wm. D. Littlepage "to hold the fund given him, until he should attain the age of twenty-five years, the interest to be expended upon his education; that he was, they thought, about fourteen years of age, and they found it impossible to make any productive investment of the capital coming to him upon good security except in government stocks; that they had on hand $3,100.00 or $3,200.00 to be invested; and they asked an order authorizing them to invest said funds in Confederate stocks or such other public stock as the judge might prefer." The judge in vacation entered an order on July 13, 1863, whereby he gave them leave "to invest the money in their hands in their fiduciary character in interest-bearing bonds or certificates of the Confederate States or of the State of Virginia." There is no proof that any such investment in

their fiduciary character was ever made; but if there had been it would not have varied the case.

In the case of *Crickard, Executor* v. *Crickard's Legatees*, 25 Grat. 410, approved by this Court in *McClure, Administrator* v. *Johnson et al.*, 14 W. Va. 448 it was decided, "that to authorize an investment by a fiduciary under an order of a judge in Confederate bonds, the act of the Virginia Legislature of March 5, 1863, required that these three conditions should concur: First. The money must be in the hands of the fiduciary. Second. It must have been received in the due exercise of his trust. Third. For some cause he must be unable to pay it over to the party entitled to it; and if they do not all exist, the order of the court or judge is null, and the fiduciary is responsible for the money."

In this case it is clear that neither condition one nor condition two existed; and this *ex parte* order of Judge Hudson was null and void. First, there were no Confederate notes or any other money in the hands of these fiduciaries belonging to Wm. D. Littlepage. And second, if it is possible to regard any Confederate notes or other money which they then had as having been received by them as executors of Michael Bunger or as trustees of W. D. Littlepage, then such Confederate notes were clearly received not in the due exercise of their trust but in clear violation of their duty as trustees. To show that this must be so, it is only necessary to state the facts briefly. These trustees were James F. Watts and James D. Kincaid; if they ever did receive this money at all, they received it from James F. Watts as the price of a tract of land, which was improperly sold by them to him. And the account, which they settled, showed that they received the whole of this money on or prior to October 27, 1861. It is not even pretended that the identical money received by them had been kept on hand, some of it for more than two years, and all of it for nearly two years, when they applied for leave to invest it in Confederate bonds. I presume the truth is that in point of fact this money was not collected by these trustees of James F. Watts either in Confederate notes or in any other sort of money. It was due from him to the trustees, no sort of money having been paid. It was simply charged up to the trustees, as if it had been

paid, one of them being responsible for it. But clearly so much of this money as belonged to William D. Littlepage ought not to have been collected by these trustees; for when collected it was the duty of the trustees to at once lend it out; and it, as they say in this petition, they could not safely lend it out, why did they collect it, when it was already in the hands of James F. Watts and most amply secured by being a lien on a tract of 774 acres of land worth more than $13,000.00? If any money was ever invested by these trustees in their name as trustees of William D. Littlepage, of which there is no proof, the investment must have been of Confederate notes of James F. Watts individually, and it was only a means of saving himself from loss by reason of the depreciation of Confederate money of his own in his hands, and imposing this loss upon William D. Littlepage.

His counsel does not contend, that under the authorities we have citted James F. Watts and James D. Kincaid had any authority by virtue of this order of Judge Hudson to make any investment in Confederate bonds, and admits that they would despite this order be bound to account for all the money of Wm. D. Littlepage that might come into their hands. But it is claimed that this was a subject of controversy in 1869, and that Wm. D. Littlepage, on September 6, 1869, when he was more than twenty-two years of age, agreed, as a compromise, that because of this loss by reason of the depreciation of Confederate bonds and their ultimately becoming valueless, Wm. D. Littlepage would abate of the principal *one-third* of his demand against his trustees, Watts and Kincaid, and that they should pay interest on the full amount of what was due only up to October 3, 1869, at which time the principal was to be thus abated. Was this a valid contract? There was certainly no consideration to sustain such an agreement, unless we are to regard this abatement as a compromise between Wm. D. Littlepage and his trustees of a controversy existing between them and him at that time. They claimed, that they were under no obligation to pay to him any part of the funds, which had come into their hands as trustees under the will of Michael Bunger, and it was, their counsel claimed, agreed, that they would pay two thirds of the principal which had come into their hands, and all

the interest, if he would surrender his claim to any more, and by this agreement he assented to this proposition. Now what were the relations of the parties to each other, when this compromise is claimed to have been made? They occupied towards him the relation of trustees and had charge and control of all of his property, and they refused to pay anything to him for his support. In this agreement it is recited, that they as executors of Michael Bunger and as his trustees had invested about the amount they owed him in a bond of the Confederate States for Wm. D. Littlepage. There is no proof that any such investment was ever made by them as trustees of Wm. D. Littlepage, or even in their own names, except that contained on the face of this agreement, which was of course information given by them. Now in point of fact all the funds of Wm. D. Littlepage were safely invested on an indebtedness of James D. Watts, perfectly secured on a farm of 744 acres, worth twice the amount of the fund due to W. D. Littlepage. This indebtedness of Watts had been simply charged up as an indebtedness of these trustees, which they claimed they had discharged by this investment, which they made in a Confederate bond long afterwards, when a Confederate bond could have been procured at a very small fraction of its nominal value, they having greatly depreciated before the investment is pretended to have been made.

It is very questionable upon the principles laid down in *Newcomb et al.* v. *Brooks et al.*, 16 W. Va. 32, whether such an agreement as that between these trustees and their *cestui que trust*, made while this relation existed between them, could be sustained, even had the *cestui que trust* been one who was in all respects capable to enter into any sort of contract with third persons. It certainly could not be upheld, unless he was made perfectly aware of all the facts by his trustees, before he made the contract with them. Such dealings between trustees and their *cestui que trust* would certainly be scrutinized by a court of equity and could not be sustained unless it was accompanied with *uberrima fides*. But in this case, it seems to me, a court of equity would not hesitate to regard this agreement as voidable at the pleasure of William D. Littlepage. His grandfather by his will, written when William D.

Litllepage was about nine years old, provided, that all his property should be under the control and management of trustees, till he should attain the age of twenty-five years. This provision was made, because the boy was weak of mind. The will provided, that the interest of what was in their hands, or so much thereof as was necessary, should be paid out by his trustees for his support and education annually. The will further provided, "that in case he should turn out a *promising and sprightly* youth, then he should be given a liberal education out of his portion of the estate." This shows, that, though the child was of weak mind, his grandfather had hopes, that he would improve and become a *promising and sprightly* youth, and if this should fortunately be the case he wished him to be liberally educated, even though a portion of the principal of his estate had to be expended in giving him this liberal education. But it turned out, that his mind remained always weak, and he remained a remarkably dull and weak boy incapable of learning even geography, and his education was necessarily confined to reading, writing and arithmetic, which he learned with difficulty. While not an idiot he was very weak minded, and, when he grew up, was incapable of understanding or attending to any business of importance, or which was at all complicated. This agreement of September 6, 1869, I am satisfied from the evidence, was a character of business far too complicated and important for him to understand; and that this was the view of these trustees is obvious on the face of the agreement. It was obviously for this reason, that they made not only him but his father a party to this agreement. He was then twenty-two years old, and his father would have had nothing more to do with this agreement than any other stranger, had not these trustees felt, that William D. Littlepage had not himself sufficient mind to render him capable of understanding this agreement and was mentally incapable of executing it. This was obviously the reason for making his father a party and procuring his approval. But his approval could give no validity to the agreement, which the trustees felt would otherwise be invalid.

After making this agreement these trustees continued to manage the estate of William D. Littlepage because of

his imbecility, till he arrived at the age of twenty-five years, that is, till August 4, 1872, and in less than a year thereafter at the April term, 1873, the county court of Greenbrier being satisfied upon evidence, that William D. Littlepage was *non compos mentis*, James F. Watts one of these trustees was appointed his committee to take charge of his person and estate, and he accepted the position. As the evidence is clear, that his mind did not grow either better or worse, what stronger evidence of his incapacity to make this agreement could be furnished than this act of one of his trustees, a party to this agreement. This agreement, was I think, clearly not binding upon him; and commissioner Withrow, who was a witness to it and knew the circumstances, under which it was executed, erred when in his settlement of January 28, 1870, of the accounts of James F. Watts, trustee and committee of Wm. D. Littlepage, he treated this agreement as binding on him. This account should have been settled just as though this agreement had never been executed by Wm. D. Littlepage. The accounts were settled with Watts alone as trustee, because, the commissioner states in this report, Watts admitted that all the funds of Wm. D. Littlepage were at all times in his hands, and he did not claim that his intestate, James D. Kincaid, was responsible for any portion of the estate of Wm. D. Littlepage, unless it was as his security because of his having been co-trustee with him, Watts.

This account was erroneous not only in this and in assuming the settlement made by Commissioner Walker to be correct, but also in allowing James F. Watts, trustee and committee, a commission on all moneys received by him, which had not been allowed in previous accounts, though he had settled no account for eight years. The account is brought up to October 24, 1875. The report having been made January 28, 1876. But before returning this report it was continued till February 21, 1876; and in this additional report he allowed to James F. Watts commission on the principal sum, $2,000.00, under this agreement, that is to say $100.00. There should have been, upon the principles we have laid down, no commission allowed to James F. Watts, except on his receipts during a period of not more than eighteen months

prior to October 24, 1875. The commission on these receipts would have been only $9.00. All the rest of his commissions are forfeited, because of his utter failure without excuse to present his vouchers to a commissioner for settlement once a year. The commissions actually allowed him in this account amounted to $140.77.

But there were other and more serious errors in this report. It allows to James F. Watts, as committee of W. D. Littlepage, a credit of $1,550.00 cash paid to James D. Kincaid for a tract of land bought of him for W. D. Littlepage, and conveyed October 20, 1873, to James F. Watts, committee of W. D. Littlepage. Now as there was no authority ever obtained of any court for this committee to make this investment of the funds of W. D. Littlepage, an idiot, in real estate, Watts as such committee had no authority to purchase this tract of land. It can not be regarded therefore as a purchase by him as committee of W. D. Littlepage, but must be regarded as a purchase by him individually; and he ought not to have been allowed this credit of $1,550.00. I deem it unnecessary to make further comment on this *ex parte* report. The purchase of this land by James F. Watts, as committee of W. D. Littlepage, of his former co-trustee for $1,550.00, without any authority from any court to make such purchase and his subsequent sale and conveyance of this tract of land without any authority from any court to Mary C. Gabbert for $1,212.00 taken in connection with his, Watts's purchase of his testator's tract of land of 774 acres of his co-executor said J. D. Kincaid, indicate a total disregard of his duties as a fiduciary, while his purchase of this 774 acres was, as we have seen, not absolutely void, but only voidable, his purchase of this tract of Kincaid in his capacity of committee of W. D. Littlepage was absolutely void, so far as it purported to invest the funds of W. D. Littlepage in this land; and it could only be operative as a purchase by himself as an individual. This tract of land being thus his individually, upon the re-sale of it to Mary C. Gabbert he became entitled to the whole of the purchase-money individually, and whatever part he did not collect, his personal representatives on his death became entitled to and are still entitled to, if it has not been paid.

We have seen, that the true balance in the hands of James

F. Watts and James D. Kincaid, trustees for Wm. D. Littlepage, on August 4, 1868, was $3,280.31, of principal, and $93.64, of interest, the principal being the same as on January 1, 1862, and that they expended in his support and education somewhat less than the interest on his capital in their hands. The report of commissioner McWhorter in this cause shows, that between August 4, 1868, and the time when James F. Watts qualified as committee of W. D. Littlepage, the April term of the county court of Greenbrier county, 1873, there was paid out by the trustees to and for W. D. Littlepage, $725.89. The interest on the principal in their hands, $3,280.36 during that time, from August 4, 1868, to say April 4, 1873, would be $918.50, to which add the interest in their hands, August 4, 1868, $93.64, and the total amount which went into the hands of James F. Watts, committee, would be $4,292.50, less $725.89, or $3,566.61, all of which must of course be treated as principal. It is admitted, that whatever was coming to W. D. Littlepage at any time was in the hands of James F. Watts; none of it being at any time in the hands of his co-trustee, Kincaid, and hence the balance due from these trustees April, 1873, $3,566.61, was the true amount, which then came into the hands of James F. Watts, committee, shortly after said Watts had sold to Mary C. Gabbert the tract of 115 acres, which he as such committee had purchased as a residence for W. D. Littlepage and his family, without authority he purchased as such committee of Joseph F. Holcomb another small farm in Greenbrier county containing 93¾ acres for the residence of Littlepage and his family. He paid for this farm $612.00; and a deed was made to him as such committee for said farm on November 8, 1881. He had no authority from any court to invest any money in his hands as such committee in this or in any other land; and in the settlement of his accounts as such committee he can be allowed no credit for this $612.00 so paid. But he should be allowed a credit for the amount of a fair rent of both the farms while they were occupied by Littlepage.

The changes, which according to the views I have expressed must be made in the report of commissioner McWhorter, are so numerous and fundamental, that I deem it much better to set aside all his reports and reverse the decree of April

26, 1883, based upon them, and remand the cause to the circuit court of Greenbrier with directions to proceed with it according to the principles laid down in this opinion, and instead of expressing an opinion and acting on each of the exceptions to his account to give some additional instructions to be followed in settling the accounts of James F. Watts committee of William D. Littlepage, when the case shall be again in the circuit court of Greenbrier to be further proceeded with.

This account of said Watts, committee of Littlepage, should not be mixed up with the accounts of said Watts and and J. D. Kincaid, executors of Michael Bunger, nor with the accounts of said Watts and Kincaid, trustees of Littlepage; but the account of Watts, committee of Littlepage should commence on the day he qualified as such committee, and on that day he should be charged with $3,566.61 received from the trustees of Littlepage, or more correctly speaking with the amount, which was in his hands or came into his hands at the time he qualified as such committee. This amount when calculated on the principles we have laid down, as it must be, is believed to be $3,566.61 but it may be that some error may on the principles on which we have laid down have been made in these figures, and if so, and it can be pointed out to the court below, it should be corrected, but the principles we have laid down must be strictly followed in ascertaining this amount. In making this settlement the committee is not to be allowed or credited with any commission or compensation of any sort for any services rendered by him except a commission on moneys received by him as such committee between July 28, 1875, and January 28, 1876, when he settled the only account he ever settled as such committee, all his other commissions being forfeited. The committee should be allowed no credit for the $1,550.00 paid to James D. Kincaid for the 115 acres purchased for William D. Littlepage or for the $612.00 paid to Holcomb for the 93¼ acres of land purchased of him for William D. Littlepage, these purchases having been unauthorized. But these two tracts of land must be treated as bought and sold by James F. Watts individually, and therefore, they being his lands, he is to be credited with the reasonable rent of said lands during the time

they were occupied and used by said William D. Littlepage. As from the report of commissioner McWhorter in this cause it is obvious, that James F. Watts as committee of William D. Littlepage never made any legal investment of any of the funds of William D. Littlepage in his hands, and that after crediting him with the rents of the lands of James F. Watts during the time Littlepage had the use of them and also with all payments made to Littlepage or to others for the support and maintenance of him and his family the funds in his hands increased, he spending including these reasonable rents less than the interest on the capital of William D. Littlepage, in the settlement of the accounts of James F. Watts as committee they should be settled on the principles of a guardian's account. The accounts are not always to be settled on the principles on which a guardian's account is to be settled; but under the circumstances shown to exist in this case they ought to be so settled.

Under the circumstances which actually existed in the case of *Bird's Com.* v. *Bird*, 21 Grat. 712, the Court properly decided, that the accounts of the committee were not to be settled on the principles of a guardian's account. The Court in that case expressly based its action in this respect on the particular circumstances of that case.

In the case of *Crigler's Committee* v. *Alexander's Executor*, 33 Grat. 681, *et seq.*, Judge Staples discusses the manner, in which the accounts of committees should be settled. He says:

"The next question is, whether in stating and settling the accounts of the intestate as committee he is to be charged with compound interest upon the balance in his hands. It is insisted this ought to be done by analogy to the rule governing in the settlement of guardians' accounts. It is sufficient to say that the liability of guardians for compound interest grows out of the peculiar provisions of our statutes on that subject. See Code of 1873, § 10, ch. 124, and *Garrett* v. *Carr*, 1 Rob. R. 196.

"These provisions have never been considered as applying to other trustees.

"The accounts of a committee of an insane person are to be settled upon principles governing in the settlement of accounts of other fiduciaries having the control of trust-funds.

They are not chargeable with compound interest except under very peculiar circumstances. When there is an express trust for accumulating, and the trustee instead of investing retains the funds in his own hands, or when he employs the money in his own business and refuses to account for the profits, he may be charged with compound interest or as a measure of damages for undiscovered profits. See 1 Perry on Trusts, secs. 470–474; *Barney* v. *Sanders*, 16 How. 535; Hill on Trustees 571, note.

"Much of the reasoning of Judge Allen in *Garrett* v. *Carr*, (1 Rob. 196) will apply as well to committees of insane persons as to guardians, and would seem to indicate that in some instances all classes of trustees, except executors and administrators, may be chargeable with compound interest even upon a mere failure to invest. See page 215.

"All that can be said therefore is, that no inflexible rule can be laid down on the subject which would apply to all cases. Generally it is conceded that a trustee and other fiduciaries, except a guardian, are liable for single interest only. This doctrine seems to be settled by a great variety of authorities English and American. 1 Perry on Trusts, secs. 470–474; *Barney* v. *Saunders*, 16 How. 535; Hill on Trustees 571, note."

In that case, as the unexpended balances in the hands of the trustee were generally small sums; and it did not appear, that he derived any profit from them, and it was regarded as a case of mere neglect to invest the money, he was therefore held under these circumstances chargeable only with single interest.

In this case the *ex parte* reports in the record and the report of commissioner McWhorter together with the evidence show, that William D. Littlepage and his family needed all the interest on his capital to support himself and his family, and that it was not all expended in such support by a good deal. The whole amount of expenditures by James F. Watts while acting as committee in the support of William D. Littlepage and his family was less than $350.00 in cash in ten years. This with the use of a very small quantity of land was all that was furnished by said Watts to said Littlepage and his family for their support. Something over $70.00 was

credited for taxes paid. Most of this was, I presume, paid for taxes on land not owned by Littlepage, but which really, as we have seen, belonged to James F. Watts individually. Whatever taxes were paid on these two tracts of land should not be allowed as credits to James F. Watts, committee, in the settling of his accounts; nor should any credits be allowed him for cash paid for the drawing of the deeds for said land or for recording them. I can not of course say what the rents of lands were worth, the use of which was furnished by Watts to Littlepage and his family; but it is evident from the prices paid for them that such rents and the average of some $35.00 a year paid in cash was a very meagre support of Littlepage and his family; and as there was interest in the hands of the committee to have furnished them a better support; and as the whole of this interest after retaining for himself a fair rent for the lands, the use of which he furnished to Littlepage, ought to have been expended in the support of Littlepage and his family; and as this was not done, but a portion of the interest was retained in the hands of the committee, it seems to me clear, that on this state of facts he ought to be charged with interest on the balance of interest, which was in his hands from year to year, that is, with compound interest, as in the settlement of a guardian's account, if we regard the law governing the subject as correctly laid down in the above quotation from Judge Staple's opinion. I am not prepared to say, that he has stated the law in all respects correctly; but I am prepared to say, that the law can not be regarded as more liberal to committees in their settlements than it is stated by him; and indeed my impression is, that the law as he states it, is too liberal to committees, and that there is a difference in some instances between the principles, on which their settlement should be made and that of some other trustees, and that in some cases committees would be charged with compound interest, as a guardian would be, when under similar circumstances some other trustees would not be so charged. But I do not deem it necessary in this case to express any opinion as to how the accounts of committees of lunatics should generally be settled, whether on the principles governing the settlement of guardians' accounts or not The circumstances we have pointed out in this case justify

and require us even on the law as laid down by Judge Staples above to direct that the accounts of James F. Watts, as committee, should be settled upon the principles of a guardian's account. Of course no commissions should be allowed Watts as committee, they having been forfeited by his failure to settle his accounts as such committee.

As it is obvious that his estate will upon the settlement to be made under the principles laid down in this opinion be indebted to the present committee of William D. Littlepage in an amount considerably greater than that ascertained by the decree of the circuit court of Greenbrier, it is obvious, that this decree was prejudicial to the appellant, and that he is entitled to his costs in this Court.

The decree of the circuit court of Greenbrier county of April 26, 1883, must be set aside, reversed and annulled, and the appellant must recover of the appellees, A. B. Watts and R. W. Hill, administrators of James F. Watts deceased, his costs in this Court expended; and this case must be remanded to the circuit court of Greenbrier county to have taken all the proper accounts in this cause, and to proceed further with this cause according to the principles laid down in this opinion and further according to the principles governing courts of equity.

REVERSED. REMANDED.

WHEELING.

SANDHEGER v. HOSEY.

Submitted June 24, 1885.—Decided July 3, 1885.

1. An affidavit for an order of attachment, which states as the ground for the order, "that the defendant has property *or* rights of action which he conceals," is sufficient, notwithstanding the disjunctive *or* is used—it being apparent that but one ground for the attachment is alleged under the statute. (p. 223.)

2. An affidavit alleges the "material facts" for an attachment to be "that the defendant is hiding and concealing a large part of the

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stock of liquors and wines which the plaintiff sold and delivered to him." HELD:

Insufficient to sustain the order of attachment. (p. 224.)

The facts of the case are stated in the opinion of the Court.

Frame & Holt for plaintiff in error.

No appearance for defendant in error.

SNYDER, JUDGE:

Action of *assumpsit* brought February 29, 1884, in the circuit court of Webster county by Christopher Sandheger against Jacob A. Hosey to recover $808.83 upon an account for liquors, wines, &c., sold and delivered by the plaintiff to the defendant. This writ of error is to an order of the court quashing the plaintiff's attachment, issued in the action and levied on the personal property of the defendant, upon the ground that the affidavit on which the attachment is based is insufficient. The only error assigned by the plaintiff in error is the order quashing the attachment.

The affidavit, after properly stating the amount, nature and justice of the plaintiff's demand, proceeds as follows: "That the following ground exists for an order of attachment in favor of the plaintiff against the property of the defendant in said action, to-wit: that the defendant has property or rights in action which he conceals; and the material facts relied upon to show the existence of the foregoing ground for said order of attachment are, that the defendant is hiding and concealing a large part of the stock of liquors and wines which the plaintiff sold and delivered to him as aforesaid."

The order of the court does not show on what grounds the court based its action, but it is stated in the brief of counsel for the plaintiff in error that the affidavit is claimed to be defective in two particulars: (1.) that the allegation, "that the defendant has property or rights in action which he conceals," is in the alternative and uncertain, and (2.) the allegation, "that the defendant is hiding and concealing a large part of the stock of liquors and wines which the plaintiff sold and delivered to him," does not meet the requirements of the statute. Whether or not these were, in fact, the grounds upon which the affidavit was held insufficient by the court is

unimportant, since it is plain, that, if it is not defective in these particulars or either of them, it is not in any other respect bad.

1.—The words, "Has property or rights in action which he conceals," are the exact language of the statute and constitute the *seventh* ground for an attachment.—See ch. 158, Acts 1882 p. 514.

Usually the plaintiff may allege as many distinct and separate grounds of attachment, within the terms of the statute, as he may deem expedient. But in doing so care must be taken that there be no inconsistency between any two of the grounds stated, for that would introduce an element of uncertainty and indefiniteness in the affidavit which might vitiate the attachment. An affidavit alleging one *or* the other of two or more distinct grounds would be bad, because of the impossibility of determining which is relied on to sustain the attachment. The several distinct statutory grounds, or facts of different natures, if two or more of such grounds or facts are stated, must be stated in the affidavit conjunctively and not disjunctively. But if the affidavit states two or more phases of the same fact, or even different facts of the same nature, which constitute together but a single statutory ground for an attachment, and do not unite two or more such grounds, they may be stated disjunctively and the affidavit will not be bad for that reason. Thus when the language of the statute was, "so absconds or conceals himself that the ordinary process of law cannot be served on him," and the affidavit used the precise language of the statute, the court held it was sufficient. *Conrad* v. *McGee*, 9 Yerg. 428; *Goss* v. *Gowing*, 5 Rich. L. 477. Or, when the affidavit, using the words of the statute, alleged that the defendant "has assigned, disposed of or concealed, or is about to assign, dispose of, or conceal his property, with intent to defraud his creditors," the court held it was sufficient. *Klenk* v. *Schwalm*, 19 Wis. 111. See Drake on Att. §§ 101, 102. I do not, therefore, think the affidavit was bad in this respect.

2.—It seems to me, however, that the second objection to the affidavit must be sustained. The "material facts," required by the statute, are the allegations which must produce in the mind of the Court the conclusion that the ground

for the attachment exists. This requirement is intended to protect the alleged debtor against an abuse of the attachment law. The facts stated must be capable of denial and disproof, and they must of themselves show an improper, illegal or fraudulent act; and they must exclude every reasonable conclusion that the act was proper and innocent. If they leave it doubtful whether the act alleged was fraudulent or innocent, the affidavit will be insufficient. An affidavit that the defendant did an act which, of itself, does not show a fraudulent intent, cannot certainly establish such intent. It is the fraudulent act and intent of the defendant to withdraw his effects from the reach of the plaintiff, his creditor, that gives the right to pursue him by attachment; and consequently, unless both such act and intent are deducible from the material facts stated, the affidavit is insufficient. *Delaplaine* v. *Armstrong*, 21 W. Va. 211.

The "material facts" stated in the affidavit in this case, viz: "That the defendant is hiding and concealing a large part of the stock of liquors and wines which the plaintiff sold and delivered to him," besides being simply a repetition of the previously alleged ground for the attachment, do not necessarily show any fraudulent intent—certainly they do not necessarily show that the concealment was intended to defraud the plaintiff or any other creditor. The defendant may have concealed the liquors and wines to avoid revenue officers, or to escape the annoyance of temperance crusaders or the importunities of persons who get drunk. No fact is stated to indicate what the affiant understands by the words "hiding" and "concealing." The defendant may have had the liquors in his cellar or in some out-house, and affiant may have regarded this to have been hiding and concealing them. In a general sense hiding and concealing may be considered an act; and the statement that the defendant is hiding and concealing may also be considered as the statement of a fact. But such generality can not be allowed in proceedings by attachment. The mode and manner of the act and the attendant facts must be stated, in order that the court may determine the purpose and character of the act and be able to decide for itself upon the propriety or impropriety of the act and to say whether it was fraudulent or innocent. Other objections might be urged

against this affidavit, but, it seems to me, that its insufficiency is so apparent that it is useless to say more. The order of the circuit court is affirmed,

AFFIRMED.

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WHEELING.

DOONAN v. GLYNN, *et al.*

Submitted June 13, 1885.—Decided July 3, 1885.

1. A plaintiff in equity can not obtain relief by alleging one ground or state of facts on which he claims the relief in his bill and by his proofs establishing a different ground or state of facts entitling him to relief. The *allegata* and the *probata* must correspond in all material respects, or relief will be denied. (p. 228.)

2. But if in such case the proofs show that the plaintiff has a cause which entitles him to relief, that it is of a similar nature to that alleged in his bill, and such as might be made available by proper amendments of his bill, the Court on the hearing should not dismiss his bill without giving him an opportunity to amend within a reasonable time. (p. 228.)

The facts of the case will be found in the opinion of the Court.

J. T. McGraw for appellant.

Martin & Woods for appellee.

SNYDER, JUDGE:

John Doonan filed his bill at the June rules 1883, in the circuit court of Taylor county against Patrick Glynn and L. S. Johnson. The bill avers, that the plaintiff, in the spring of the year 1873, sold to the defendant Glynn a lot in the town of Grafton, designated as lot No. 77 on Fetterman's plat of said town, for the sum of $——; that upon a settlement had between him and said defendant about May 10, 1873, defendant was found indebted to him $250.00 on account of said purchase, for which the defendant on that day executed to him his bond payable one day after date; that on the

same day he executed and delivered to said defendant a deed for said lot retaining on the face thereof a lien upon the lot for said $250.00; that said deed has never been admitted to record in said county; that said $250.00 remains wholly unpaid and is a lien on said lot; that by deed dated January 11, 1882, said defendant conveyed to his co-defendant Johnson, the fee of said lot subject to the life-estate of defendant Glynn; and the plaintiff prays that defendant Glynn may be required to file in the cause the deed made to him for said lot, and that said lot may be sold and said debt paid out of the proceeds, &c.

The plaintiff exhibits said bond with his bill and it recites that it is given for purchase-money of said lot No. 77, and is dated as stated in the plaintiff's bill.

Both defendants answered the bill, the defendant Johnson admits the conveyance of the lot to him as stated in the bill, but denies that the plaintiff retained a lien upon the face of the deed made by plaintiff to Glynn for said lot and refers to and adopts the answer of Glynn as to the facts re-stated therein.

The defendant Glynn states in his answer, that plaintiff in the spring of 1873 conveyed said lot to him by deed with general warranty, but denies that any lien was retained therein for the payment of said bond of $250.00; that he purchased said lot at the price of $300.00, and a few days thereafter paid the whole of the purchase-money, including the said bond of $250.00, by assigning to plaintiff a note for $300.00, executed to him by George Avington, which was paid to the plaintiff; that in May, 1873, he took possession of said lot, fenced it and built a small frame-house upon it in which he has ever since resided, and never until about eighteen months prior to the commencement of this suit did he learn that plaintiff pretended to have any claim upon said lot; that on January 30, 1882, plaintiff brought an action of ejectment against him and his co-defendant for said lot, in which such proceedings were afterwards had, that on March 27, 1883, a verdict and judgment were rendered in his favor; that in July, 1883, he placed said deed to him in the custody of plaintiff for safe-keeping upon the promise of plaintiff that he would return it upon request and the plaintiff still has it, though he falsely pretends the same has been lost knowing

that its production will refute his allegation that a lien was retained therein.

A transcript of the record of said action of ejectment duly certified from the circuit court of Taylor county, which shows that said action was instituted and prosecuted in said court with the result stated in the answer aforesaid, is exhibited.

The deposition of the plaintiff was taken on his own behalf and he testified, that he verbally sold said lot to Glynn, in the spring of 1873 for $350.00, and about the same time received a note from Glynn on George Avington for $300.00; that at the same time Glynn being unable to do so himself contracted with him to improve the lot and furnish the means therefor, Glynn stating that the house and lot would be good for the amount so expended; that in pursuance of this arrangement he had a house built upon the lot and made other improvements at a cost of over $160.00; that during the progress of the work, he had a settlement with Glynn, and he owed him $250.00, for which the aforesaid bond was given, and at the same time he gave Glynn a written title-bond for the lot, there having been no writings between them before that time; that the said $250.00 bond has never been paid; that some time after he delivered the title-bond, Glynn returned it to him, stating that he did not believe he could keep the property as the officers of the law were after him for being engaged in some illegal traffic; that since the last term of the court he had found the title-bond and produced it as a part of his deposition. On cross-examination he stated that about two years ago he had brought an action before a justice to recover the said lot claiming it to be his own; that he had also brought an action before the same justice against Glynn for the rent of said lot, and that these actions were dismissed, because the title was brought in question; that he testified in said actions and also in the ejectment case that he was the owner of the lot and said he never considered that Glynn, after he returned the title-bond, had any title to the lot, until the court decided against him; that after Glynn gave up the title-bond and said he could not keep the property or pay for it, he asked Glynn on several occasions either to pay for or surrender the property, and Glynn told him more than once that he would give

it up but afterwards declined to do so, and he brought suit against Glynn.

The title-bond referred to in the above deposition appears in the printed record to be dated May 16, 1873, but the person who wrote it testifies the date looks something like May 10, 1873. It recites that the consideration for the lot was $350.00 of which it acknowledges $115.00 had been paid and binds Doonan to make and deliver to Glynn a deed for the lot upon the payment of the purchase-money.

Neither of the defendants gave their depositions and no testimony was filed in their behalf other than as hereinbefore stated.

The cause was heard on November 19, 1883, upon the bill, answers and replications thereto, depositions and exhibits filed; and thereupon the court entered a decree dismissing the plaintiff's bill with costs, and he brought this appeal.

It is evident from the preceding statement of the pleadings and proofs that the case alleged by the former is not sustained by the latter. It is also plain that there never was in fact any deed made by the plaintiff to Glynn for the lot, for by the terms of the title-bond no deed was to be made until the purchase-money should be paid, and the evidence shows that this has never been done. The allegation of the bill, therefore, that a deed, with a lein retained on its face was made by the plaintiff to Glynn is a plain mistake.

It is apparent that the instrument executed and delivered to Glynn was the title-bond referred to and not a deed, and that the title to the lot and not a lien thereon was retained to secure the payment of the purchase-money.

It is well settled that no relief can be granted, unless the pleadings and proof agree and the one is sustained and established by the other. A plaintiff can not obtain relief by averring one state of facts or ground for relief in his bill and establishing a different state of facts or ground for relief by his proofs. The two must correspond in all material respects or the relief prayed will be denied. The plaintiff in this cause having failed to prove the allegations of his bill so as to entitle him to the relief prayed, was not in a situation to demand a decree in his favor. *Bougher* v. *Eichelberger*, 11 W. Va. 217. But in as much as the proofs showed that he had a cause of action of a similar nature to that alleged in

his bill and such as he might make available by proper amendments to his bill, the Court should not have dismissed his bill without giving him an opportunity to amend it. *Lamb* v. *Cecil*, 25 W. Va. 288.

The plaintiff averred in his bill that he had conveyed the title to the lot sought to be sold and retained a vendor's lien, which he asked the Court to enforce, while in the proof he shows that no such conveyance had ever been made, but that he had retained the title to secure his debt. The substance of these two grounds for relief is the same. The difference is merely in the form of the security which he has upon the lot sought to be subjected to his debt. It seems to me, therefore, plain it would be inequitable and unjust to dismiss his bill absolutely and place upon him in any new suit he might bring the hazard of being met by the defence of *res judicata*. I do not say such a defence would be sustained or that it would not, but I do not think the rules of equity require that we should in this cause compel the plaintiff to resort to a new suit to obtain relief.

The result of the action of ejectment, pleaded in the answer of the defendant Glynn, can not operate as an estoppel or bar to this suit. That action was founded on the assumption that the plaintiff had the legal title to the lot in controversy, and the court decided that he had no such title. This suit admits that the result of that suit settled the question that the title was in the defendants, and the plaintiff is now seeking to enforce his lien on the lot as the property of the defendants. It is true the defendants did not in fact have the legal title to the lot, but they hold as vendees of the plaintiff by a written contract, stating the purchase and the terms thereof, signed by him; and this contract under our statute is just as effectual to defeat a recovery in ejectment as the possession of the legal title. Sec. 20, chap. 90, Code, p. 520.

For the reasons aforesaid I am of opinion that the decree of the circuit court be reversed; and the cause is remanded to said court with directions to it to permit the plaintiff to amend his bill in the manner herein indicated, if he desires to do so, and if he fails to make such amendment in a reasonable time then to dismiss his bill finally.

REVERSED. REMANDED.

26 565
38 76
26 230
45 580
26 230
47 519
26 230
58 522

WHEELING.

CHENOWITH v. COMMISSIONERS OF RANDOLPH COUNTY.

Submitted June 13, 1885.—Decided July 3, 1885.

1. The writ of *certiorari* lies in this State from a circuit court or a judge thereof in vacation to the county court commissioners convened in special session to ascertain the result of an election. (p. 232.)

2. The said county court commissioners, after they have opened the sealed packages of ballots returned by the district commissioners, re-counted them upon the demand of opposing candidates for the same office and then again sealed up the ballots, can not under the provisions of sec. 21, chap. 155 Acts 1882 upon a subsequent demand of either of said candidates re-open the sealed packages and re-count the ballots a second time. (p. 234.)

The opinion of the Court contains a statement of the facts of the case.

L. D. Strader for plaintiff in error.

B. L. Butcher and *J. J. Davis* for defendant in error.

SNYDER, JUDGE:

This is a writ of error to an order of the judge of the circuit court of Randolph county refusing a writ of *certiorari* upon the petition of the plaintiff in error, Z. T. Chenowith The allegations of the petition on which this court founds its decision are in effect as follows:

The petitioner and Warwick Hutton were opposing candidates for the office of Sheriff of Randolph county and voted for as such at all the voting precincts in said county at the general election held October 14, 1884; when the commissioners of the county court convened in special session, October 20, 1884, to ascertain the result of said election in said county, it was found that the poll-books and certificates of the several districts showed that said Hutton had a majority of three votes over those cast for petitioner; thereupon petitioner demanded of said court that they re-count the ballots cast in seven of said districts and then the said Hutton demanded a re-count of the ballots cast at the

two remaining districts; the court did open and recount the ballots of all the districts, and on the same day the court again sealed up the ballots of the several districts along with the original envelopes in other envelopes which were properly endorsed by the clerk of the court; it was found as the result of the re-count that petitioner had 849 votes and the said Hutton 846; on the next day, October 21, 1884, the said Hutton demanded of the court that it should again open and re-count the ballots of three of the districts and that petitioner objected, but the court overruled his objection and re-opened and re-counted the ballots of said districts and the result of this re-count, by including certain votes for Hutton which were objected to by petitioner, was 848 for Hutton and the same number for petitioner, thus producing a tie vote between them; then on the following days, to-wit, on October 22 and 23, 1884, petitioner demanded that the ballots of certain districts should be re-counted a third time and while proceeding with such re-count the court discovered that two ballots which had been voted for Hutton had been taken from one of the envelopes and two ballots for petitioner substituted therefor; upon this discovery the Court refused to consider said third re-count, and adopted as the true result the said second re-count which gave each of the candidates the same number of votes; the court then elected said Hutton to the office of sheriff and gave him a certificate of his election to said office. The prayer is that the proceedings of said county court may be supervised by writ of *certiorari*.

The statute, under which the county court is required to proceed in determining the result of an election, is in substance as follows: The Commissioners of the county court, shall convene in special session on the fifth day after the election and the ballots, poll-books and certificate shall be placed before them for examination.. "They may, if deemed necessary, require the attendance of any of the commissioners or canvassers, or other officers or persons present at the election, to answer questions under oath respecting the same and may make such other orders as shall seem proper to procure correct returns and ascertain the true result of said election in their county. * * * * They shall, upon the demand of any

candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and re-count the same, but in such case they shall seal up the same again, along with the original envelope, in another envelope, and the clerk of the court shall write his name across the seal," &c. When they have declared the result of the election they shall deposit the sealed packages of ballots with their clerk to be preserved by him for one year if there is no contest and if there be a contest until the same is decided and then they shall be destroyed. Sec. 21, ch. 155, Acts 1882, p. 498.

The next succeeding section of said Act provides, that the said courts, "under the regulations prescribed in the next preceding section, shall carefully and impartially ascertain the result of the election in their county, and in each district thereof, and make and sign as many certificates thereof as may be necessary, in the following form," &c.: (here the form is given.)

The 24th section authorizes the courts, when there is a tie vote between two candidates, to elect one of them.

It is contended by the defendant in error, that the circuit court had no jurisdiction to award the writ of *certiorari* prayed for, and that, therefore, its refusal to do so was proper and should be affirmed by this Court.

It is very true that according to the common law the writ of *certiorari* issued only from a superior court to one of inferior jurisdiction, commanding the latter to certify to the former the record or proceedings in a particular case. 4 Minor's Inst. 300.

The general rule is, that upon such writ the superior court will only inquire into errors and defects which go to the jurisdiction of the inferior court. But if the inferior tribunal proceeds in a summary manner and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the superior court will consider other than jurisdictional questions. *Poe* v. *Machine Works*, 24 W. Va. 517; *Dryden* v. *Swinburn*, 20 *Id.* 89.

By our statute this remedy is in express terms extended to proceedings before a county court, council of a city, town or village, justice or other inferior tribunal after judgment or final order in any case, except where the circuit court has

authority to review such judgment or order on motion, or on appeal, writ of error or in some manner other than upon *certiorari*. Sec. 2, chap. 153 Acts 1882, p. 488.

The third section of said statute directs that the commissioners of the county court, the justice or the presiding officer of the inferior tribunal shall, if required, sign bills of exceptions, and "upon the hearing the circuit court shall, in addition to determining such questions as might have been determined upon *certiorari*, as the law heretofore was, review such judgment, order or proceeding of the county court, council, justice or other inferior tribunal, upon the merits, determine all questions arising on the law and evidence and render such judgment or make such order upon the whole matter as law and justice may require." And the fourth section provides that such writ may be awarded by the judge of the circuit court in vacation.

This statute greatly enlarges the remedy by *certiorari*, both as to the questions that may be reviewed by it and the inferior tribunals to which it is made to lie. Whether it is thus extended to all interior tribunals whether executive, ministerial or judicial in their nature it is unnecessary to decide in this case, because it expressly mentions county courts and makes no exception as to whether the matters to be reviewed are judicial or merely ministerial. I think, therefore, it is plain that the writ was intended to apply to such a case as the one before us.

In *Brazie* v. *The Fayette County Commissioners*, 25 W. Va. 213, this Court, in construing the statute now in question said: "The duties and powers of commissioners are mainly ministerial, but are *quasi* judicial so far as it is their duty to determine whether the papers laid before them by the clerk, and purporting to be returns, were in fact such, were genuine, intelligible and substantially authenticated as required by law. To the extent here indicated, a judgment in the nature of a judicial function is necessarily exercised; for, if it were otherwise, the whole law is inoperative in respect to the powers of the county commissioners to do any act whatever. But aside from these limited judicial functions, the commissioners possess no discretionary powers, their duties are purely ministerial."

In the case just cited this Court held, that a writ of prohibition lay from the circuit court to the county commissioners of a county, assembled in special session to ascertain the result of an election. It seems to me, therefore, there can be no question in this State that the writ of *certiorari* will lie from the circuit court to the county commissioners so assembled. In view of this decision and our statute law, it is unnecessary to enquire what the law is on this subject in other States having no such statute.

The county commissioners thus acting in special session, are an inferior tribunal proceding in a summary manner and not according to the course of the common law. This tribunal is a creature of, and its proceedings are governed entirely by the statute; and no provision is made for a review of its action or proceedings upon motion, appeal, writ of error, or *supersedeas*. If its proceedings can not be reviewed by *certiorari*, then they can not be reviewed at all. It is true, there may be an appeal from a final order of the county court in cases of contested elections. Sec. 47, ch. 5, Acts of 1881. But that would be in another and a different case. It would not be an appeal from the action of the county commissioners convened as a returning board, but from the judgment of a tribunal exercising very different powers and in a new and different case or proceeding.

Upon the merits of this case as alleged in the petition there can be, it seems to me, but little room for controversy. The statute declares that the commissioners "shall, upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same," &c. This language reasonably construed can not mean that the candidates voted for have the right to demand a re-count of the ballots not only once but an indefinite number of times. If a candidate may rightfully demand a re-count a second time he may do so a third time or oftener. Unless the statute means that there shall be but a single re-count, its language furnishes no limit to the number of re-counts that may be demanded by the same candidate; and it might be made the instrument of defeating the result of an election. Such a destructive and unreasonable effect could not have been intended or even contemplated by

the legislature. The object of the statute was, evidently, to furnish the means of revising and correcting any mistakes or blunders of the district commissioners by the county commissioners. When this is done to the satisfaction of the commissioners, and the ballots re-sealed and endorsed the right to demand a further re-count by candidates at whose instance or in whose presence one re-count has been made ought not to be allowed. The impropriety of permitting an indefinite number of re-counts is illustrated by the fraud attempted in this case. It is necessary that there should be an end to the controversy in such matters and that the rule by which the end is to be arrived at should be plain and simple.

It is not necessary to decide in this case whether or not each candidate shall have the right to demand a re-count. The reasonable and practicable rule would seem to preclude such right after there had been a re-count at the instance of some other candidate at the same election. It is known by all the candidates on what day the commissioners meet and if any one or more of them desire to have a re-count of the ballots in his case, notice can be given to the commissioners, all can be present and the re-count made for each candidate at one and the same time, and thus finally end the matter. According to the allegation of the petition in the case at bar the first re-count was made at the instance of both the candidates for sheriff, the re-count was carefully made and the ballots again sealed up and endorsed without objection by either. It is, therefore, plain that under any fair interpretation of the statute, neither of these candidates had a right to demand a second re-count of the ballots after they had been thus fairly counted at their instance and again sealed up.

In *Perry* v. *Horn*, 21 W. Va. 732, this Court, under chap. 172, Acts 1872–3, which provides that, if an appellant or plaintiff in error should fail, within six months after his case has been docketed in the court of appeals, to deposit with the clerk a sufficient sum to pay for printing the record, his appeal shall be dismissed, "but it may be renewed at any time within five years from the date of the judgment or decree appealed from," held that but one appeal, after such dismissal, can be allowed by the court of appeals. That statute is to some extent analogous to the one under consideration and the con-

struction given to it is in harmony with the conclusion arrived at in this case.

There are other irregularities alleged, which are not important in the view taken by this Court, and they have not been considered.

The record before us, seems to contain all that could have been brought up by the return of the county court if the writ had been issued by the circuit court. But as the writ was refused by that court, we can only regard the petition. What the record in the county court is, can only be made to appear from the return to the writ duly certified. The statute, as we have seen, makes bills of exceptions and other matters part of the record to be returned and considered by the circuit court and requires that court upon the hearing to review the proceedings of the county commissioners "upon the merits, determine all questions arising upon the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require." Acts 1882, p. 488.

Having decided that the facts alleged in the petition are sufficient to entitle the petitioner to a writ of *certiorari*, the order of the circuit court refusing the writ must be reversed; and the case is remanded to that court with directions to it to award the writ of *certiorari* as prayed for, and if the record of the county court commissioners referred to in the petition sustains the allegations of the petitioner to the extent indicated in this opinion, then, said court shall make such order as the county commissioners should have made in the premises by declaring that the petitioner is duly elected to the office of sheriff of Randolph county, &c.

REVERSED. REMANDED.

WHEELING.

26 236
40 418

STATE v. HALL.

26 236
65 526

Submitted June 9, 1885.—Decided July 3, 1885.

1. An indictment, which charges an offence in the language of the statute, will not be held bad because it contains surplus matter. (p. 237.)

2. A new trial for errors committed during the former trial can only be had after motion made in the trial-court and overruled, as this Court will not *ex mero motu* grant a new trial. (p. 238.)

The opinion of the Court sets out the facts of the case.

J. W. McCoy for plaintiff in error.

Alfred Caldwell, Attorney General, for State.

JOHNSON, PRESIDENT:

The following indictment was at the March term, 1884, of the circuit court of Marion county found against the defendant:

"The jurors of the State of West Virginia, in and for the body of the county of Marion, and now attending the circuit court of said county upon their oaths present, that one Will H. Hall, on the —— day of February, 1884, in said county of Marion, did unlawfully sell, offer and expose for sale, at retail, spirituous liquors, wine, porter, ale, beer, and drinks of a like nature to one W. B. Thorn, without a license to do so as required by law, and without having obtained from the county court of said county, or other tribunal therein acting in lieu of the county court, a certificate that said Will H. Hall is not of intemperate habits as required by law and without having given bond as required by law, against the peace and dignity of the State."

The defendant moved to quash the indictment, which motion the court overruled. The defendant pleaded *not guilty*, on which issue was joined, and the case was on March 14, 1884, tried by a jury, and the defendant found guilty. *He did not move to set* aside the verdict, but filed a bill of exceptions to a certain instruction given to the jury, which bill also sets out all the evidence in the case. The court upon the verdict rendered judgment for a fine of $25.00 and costs. To this judgment the defendant obtained a writ of error.

The first error assigned is, that the court did not on defendant's motion quash the indictment. The conclusion of the indictment contains surplus matter; but that does not vitiate it. The indictment contains all that is necessary. (*State* v. *Pendergast*, 20 W. Va. 672.) The motion to quash was properly overruled. The only other assignment of error

is the giving of the instruction asked by the State. This assignment we can not consider, as no motion was made for a new trial; and the exception to the giving of the instruction will therefore in the appellate court be deemed to have been waived.

A new trial for error committed during the former trial can only be had after motion made in the trial-court and overruled; as this Court will not *ex mero motu* grant a new trial. (*State, for use, &c.* v. *Phares*, 24 W. Va. 657; *Danks* v. *Rodeheaver, infra.*) And, as a motion for a new trial can be waived by any defendant, this principle applies as well to a criminal as a civil case. (*Sutphin's Case*, 22 W. Va. 771.)

The judgment of the circuit court is affirmed.

AFFIRMED.

WHEELING.

ROGERS *et al v.* CORROTHERS.

Submitted June 13, 1885.—Decided July 3, 1885.

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1. An umpire may be selected either before or after a disagreement between the arbitrators. (p. 245.)

2. Where a submission "authorizes and directs the arbitrators to select an umpire," it means, if there should be disagreement, the umpire shall settle it. But if under such submission there is no disagreement, and no umpire is chosen, the award will not be bad, because the arbitrators did not choose an umpire. (p. 245.)

3. A statutory award is complete, when it is signed and published and ready to be returned to court; and when it is so made, the authority of the arbitrators is gone, and they are *functus officio*. (p. 245.)

4. When an award is made, the arbitrators can not change it, and though they do attempt to change it, effect may be given to it as it originally was. (p. 246.)

5. A party, who himself has been the only cause of misbehavior on the part of the arbitrators or either of them, can not be heard to complain of such misbehavior. (p. 246.)

6. Technical precision and certainty are never necessary in an award. If it be expressed in such language, as plain men acquainted with the subject-matter can understand it, that is enough. (p. 246.)

7. If an award settling a corner and lines between two tracts of land shows that two points one in each of two lines are ascertained, they will be regarded as fixed and certain, unless the record shows, that they are uncertain; and if the award gives directions to ascertain where the corner, which must settle the dispute, is located by the award, and in such a manner that any competent surveyor could from such award find the corner and lines, the award is certain. (p. 248.)

8. Where arbitrators have made and published their award, and at the instance of one of the parties they change the award, and the award so changed is returned to court, and the other party moves to have the changed award entered up as the judgment of the court, and it is so entered up against the protest of the party at whose instance the original award was changed, by an addition thereto, whereby it was made more favorable to him, said party is not prejudiced by the entering up of the second or changed award instead of the first. (p. 249.)

A statement of the facts of the case will be found in the opinion of the Court.

Martin & Woods for plaintiffs in error.

H. J. Snively for defendant in error.

JOHNSON, PRESIDENT:

This is a writ of error to a judgment of the circuit court of Taylor county, entering up an award of arbitrators as the judgment of the court. The submission is as follows:

"This writing witnesseth an agreement mutually made and entered into this November 17, 1881, by and between Thomas Rogers, Jacob Peters and Amaziah P. Boyce, of the one part, and Samuel Corrothers, of the other part, all of the county of Taylor, West Virginia, wherein and whereby the above named parties submit to arbitration all matters growing out of and concerning a certain dispute as to which is the proper line between their lands lying upon the water of White Day creek, in said Taylor county. The land which the said Rogers represents has been conveyed to Jacob S. Peters, who now owns it, save a portion conveyed to Amaziah P. Boyce, and which was formerly known as the Matthews tract. That

which the said Corrothers represents was purchased by Andrew Corrothers from Thomas Haymond, and now belongs to him, the said Samuel Corrothers. The object of this submission is to settle the proper lines and boundaries between the said lands completely, and to settle all damages arising out of the dispute concerning the said boundaries, and to settle and fix the several corners between the said land. The parties aforesaid mutually agree to submit the said matters in controversy and to be settled by this submission to the following named parties, to-wit, to Marmaduke H. Dent and Leonidas S. Johnson, who are authorized and directed to choose an umpire. The said arbitrators shall hear all testimony legally submitted by each party to the controversy, and be the judges of the law and the facts in the case. A notice from the arbitrators of thirty days shall be necessary as to the time and place of arbitrament before the said arbitrators shall proceed to hear testimony.

"Each party further hereby agrees that this submission may be entered of record in the circuit court of Taylor county, and that the award of the said arbitrators concerning the matters above mentioned shall be made the judgment of the circuit court of Taylor county, and that the said award shall be returned to the said court accordingly.

"Witness our hands and seals this November 17, 1881.

"THOMAS ROGERS, [SEAL.]
"AMAZIAH P. BOYCE, [SEAL.]
"J. S. PETERS, [SEAL.]
"SAM'L CORROTHERS, [SEAL.]

"Attest all of the above signatures:

"H. J. SNIVELY."

The award is as follows:

"We, the undersigned arbitrators, to whom was referred the matters of dispute as to the division lines between the lands of Samuel Corrothers and the lands now owned by J. S. Peters and Amaziah P. Boyce and formerly owned by Thomas Rogers, by written contract signed by all of said parties on November 17, 1881, having been first duly sworn for the purpose, and having heard and considered the evidence and papers produced by any and all of the said parties, after thirty days' notice, as required by the article of submission,

do make, publish and declare our award to be as follows, to-wit: That the true lines between the said lands in dispute are and shall remain—1st, a part of a four hundred pole line of said Samuel Corrothers' survey, which begins where once stood a red oak corner, now gone, and ends at pointers; 2d, a part of a 260 pole line of same survey, which begins at a double poplar, corner to Samuel Corrothers' lands, and ends at said red oak corner.

"And we further award that the point where said red oak stood is and shall remain a corner between said lands, and that the same is and shall remain situated exactly 400 poles from said pointers and 260 poles from said double poplar corner, provided, however, that when said lines are surveyed said point shall not fall further on the Corrothers' side of said lines than said Rogers and Peters claims the same to be, and in that case our award is that the said point where the said Rogers and Peters claim the said red oak to have stood, shall be the corner between said lands, and the lines shall be straight lines from said point to said double poplar corner and said pointers, respectively.

"And we further award that in locating said point said parties shall be governed by the courses of Samuel Corrother's title papers, corrected so as to locate said corner at the point aforesaid, and said lines shall not be varied from a direct or straight course from said corners to the angle or point aforesaid by reason of any marked trees that may be found along or in the vicinity of said lines. And it appearing to us that said parties have been equally neglectful about preserving said red oak corner, and have destroyed and allowed the same to be destroyed and the traces thereof to become obliterated, we therefore award that said Corrothers shall pay one-half the costs of this arbitration and that said Peters and Rogers shall pay the other half of said costs.

"Given under our hands and seals May 18, 1882.

"L. S. JOHNSON, [SEAL.]
"M. H. DENT, [SEAL.]"

"Clerk's endorsement on foregoing award:

"Filed October 23, 1882.

"Teste: JNO. S. S. HERR,
"*Clerk of the Circuit Court of Taylor Co., W. Va.*"

On November 16, 1882, the arbitrators having returned their award, it was on motion of Thomas Rogers ordered, that Jacob S. Peters, Amaziah P. Boyce and Samuel Corrothers be summoned to appear at said court on the fifth day of the next term thereof and show cause, if any, why the said award should not be entered up as the judgment of the court.

On November 21 the plaintiff, Rogers, moved to have said award entered up as the judgment of the court, and the defendant, Corrothers, resisted said motion, and the defendants Peters and Rogers offered no objections, and, the evidence and arguments having been heard, the court entered up said award as the judgment of the court, to which judgment the defendant, Corrothers, excepted; and the bill of exceptions saved certifies all the evidence heard by the court on said motion, which is in substance as follows: The submission and the award on behalf of the plaintiff; the evidence of Corrothers that some time within a month after May 18, 1882, Marmaduke H. Dent gave witness as the award of himself and L. S. Johnson a paper-writing signed by said Dent and Johnson, which is as follows:

"We, the undersigned arbitrators, to whom was referred the matters of dispute as to the division lines between the lands of Samuel Corrothers and the lands now owned by J. S. Peters and Amaziah P. Boyce, and formerly owned by Thomas Rogers, by written contract signed by all of said parties on November 17, 1881, having been first duly sworn for the purpose, and having heard and considered the evidence and papers produced by any and all of said parties, after thirty days' notice to them as required by the article of submission, do make, publish and declare our award to be as follows, to-wit:

"That the true lines between the said lands in dispute are and shall remain—1st, a part of a 400 pole line of said Samuel Corrothers' survey which begins where once stood a red oak corner, now gone, and ends at dogwood pointers; 2d, a part of a 260 pole line of same survey which begins at a double poplar, corner to Samuel Corrothers, and ends at said red oak corner.

"And we further award that the point where said red oak stood is and shall remain a corner between said lands, and

that the same is and shall remain situated exactly 400 poles from said dogwood pointers and 260 poles from said double poplar corner.

"And we further award that in locating said point said parties shall be governed by the courses of Samuel Corrothers' title papers, corrected so as to locate said corner at the point aforesaid exactly in a straight line 400 poles from said dogwood pointers and 260 poles from said double poplar corner, and said lines shall not be varied from a direct or straight course from said corners to the angle or point aforesaid by reason of any marked trees that may be found along or in the vicinity of said lines.

"And it appearing to us that said parties have been equally neglectful about preserving said red-oak corner, and have destroyed and allowed the same to be destroyed and the traces thereof to become obliterated, we therefore award that said Corrothers shall pay one-half the costs of this arbitration and that said Peters and Rogers shall pay the other half of said costs.

"Given under our hands and seals this 18th day of May, 1882.

"L. S. JOHNSON, [SEAL.]
"M. H. DENT. [SEAL.]"

This paper witness says was given to him a short time after it bears date by said Dent as the genuine award of himself and Johnson.

John S. S. Herr testified, that he was acquainted with the handwriting of Dent and Johnson; that the paper, of which witness Corrothers had spoken, bears the genuine signatures of said Dent and Johnson.

Frank Woods was sworn and stated that a copy of the award filed in the clerk's office was handed to him as Corrother's attorney by M. H. Dent on October 29, 1882.

The plaintiff then introduced Dent, who said, he was one of the arbitrators. Corrothers asked witness to give him some idea of what the award would be. The copy, to which reference was made, was handed to them, the parties, shortly after May 18, 1882, so that they could raise any exceptions, and not as the final award. The final award was returned to court. The paper filed by the arbitrators on October 23

1882, in the clerk's office is the true judgment of the arbitrators and is their award. Corrothers brought the copy given to him shortly after May 18, 1882, back to witness, and also a plat made by Mr. F. Woods, and showed witness, that the award was not what the arbitrators intended it should be, and that it would be unjust to Corrothers. In making up their award they modified it to protect Mr. Corrothers.

L. S. Johnson was also sworn as a witness. He said he was one of the arbitrators; that the arbitrators met, and came to a conclusion after deliberating together; Dent drew up the conclusion in the shape of an award, and after a good deal of solicitation from Rogers and Corrothers they gave the result of their conclusion. Witness did not look upon it as a finality between the parties, until the award was fully made out and returned to the clerk's office of the court. Mr. Dent suggested some changes in the first arrangement, to which witness consented, and they drew up an award and signed it, and witness filed it in the clerk's office as their final award. The one so filed is their award.

Corrothers was examined in rebuttal and said: "I never heard anything to the contrary but what that paper marked 'O' (the first award) was the genuine award." On cross-examination he said: "I did go to Dent a good many times and insisted that the award he gave me, I mean the paper marked 'O,' was wrong and wouldn't work. I wanted to know what the award would be. I did exhibit to Mr. Dent the plat Mr. Frank Woods made and pointed out the injustice the award marked 'O' would be to me. I told Dent it was doing me a great injury and would take more land than Peters claimed. This award 'O' was understood as a final award. The value of the amount in controversy in this case was two hundred dollars."

To the judgment of the court entering up the award as a judgment the defendant, Carrothers, obtained a writ of error.

It is assigned as error, that the arbitrators failed to choose an umpire according to the requisites of the submission. The submission says: "The arbitrators are directed to choose an umpire." An umpire is a person, whom two or more arbitrators under authority of the parties to the submission select. His function is to decide the controversy, which the arbitrators

have been unable to decide. He is not to act in conjunction with them, but as a substitute for them. He is, as it were, a sole arbitrator, with the same duty of hearing the whole case *de novo*, as would have devolved upon him, had he been originally appointed alone. (Morse on Arb., 241; *Barrett's Adm'r* v. *Cunningham's Adm'r*, 9 Grat. 684.) Where a submission is made of all matters in difference between two parties in a particular suit then pending to two persons *and such umpire as they shall choose*, and *their* award to be made the judgment of the court, and the arbitrators and umpire *act together* and make a *joint* award, such award will be good. Although the award does not state that the third person, who signed the award, had been chosen by the arbitrators as *umpire*, yet that fact may be proved by other evidence. If the third party, who signed the award, was a mere *stranger*, this would not vitiate the award. (*Rison* v. *Berry*, 4 Rand. 275.) The submission evidently intended no more than that *in case of disagreement* the arbitrators "were authorized and directed to choose an umpire." They might, if they had chosen to do so, have selected the umpire, before they heard the case, and let him sit with them and hear the evidence, so that in case of disagreement between the arbitrators he could at once proceed to decide the case; and generally this would be the best course to pursue, as in case of disagreement, if an umpire were then first appointed, he would have to hear the evidence. But it was not sufficient certainly to set aside the award, that the umpire was not appointed, when there was no necessity for his appointment—as there was no disagreement between the arbitrators.

It is also insisted that the award was made, after the arbitrators were *functus officio*, they having made and published an award under the submission. It seems to us a fact established, that there was an award made on May 18, 1882, regularly signed by the arbitrators, and the original handed to one of the parties.

In *Mathews* v. *Miller & Quarrier*, 25 W. Va., it was held, that a statutory award must be regarded as complete, when it is signed and published and ready to be returned to court.

Mr. Robinson in his Practice, Vol. 6, 468, says: "When an award is once made, the arbitrator's authority is spent, and

he is *functus officio*. Thereafter there can be no new and distinct act of judgment formed by him, nor any effectual alteration of the award, but it may have effect as it originally was." He cites, *Hereford* v. *Brunley*, 6 East 311; *Irwin* v. *Elnon*, 8 East 54; *French* v. *Patton*, 9 East 355; *Bayne* v. *Morris*, 1 Wall. 97.

In 6 East 311 it was held, that after an award made under the hand of an umpire and ready for delivery pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day and before delivery of the award, is void, but the award is good for the original sum awarded, which was still legible, the same as if said alteration had been made by a mere stranger without the privity or consent of the party interested. The authorities cited all sustain the position, that when an award is completed ready for delivery, the power of the arbitrators over it is gone.

So in this case, when the first award was made and signed and notice given to the parties, that it was so made, the arbitrators had nothing more to do with it except to return it to court. The award then made might have been entered up as the judgment of the court, as we have seen. The award that was entered up was more favorable to the party complaining here than the original one; and he is not therefore prejudiced by the alteration. The plaintiff in error complains of the misconduct of the arbitrators. He is the last man who can be heard to complain of such misconduct, as it was all at his instance and in his favor. He went to the arbitrator Dent with a plat and tried to convince him and succeeded, that injustice had been done him by the award, as they had given Rogers more land than he claimed. Yielding to the influence of the plaintiff in error they changed the award and made the second award.

It is also assigned as error, that the award is uncertain, and therefore void. Kent, C. J., said: "It ought to appear from the context of the award or from the nature of the thing awarded or by a manifest reference to something connected with it, what things the parties are ordered to do." (Morse on Arb. and Aw. 409; *Schuyler* v. *Van Der Vier*, 2 Com. 235.) Technical precision and certainty are never necessary in an award. If it be expressed in such language, that plain

men acquainted with the subject-matter can understand it, that is enough. (Morse on Arb. and Aw. 408; *Butler* v. *Mayor, &c.*, 1 Hill 489.) Morse in his work on Arbitration and Award 408, correctly lays down the rule as follows: "An essential characteristic of an award is certainty. It is not necessary, that it should be written with such technical, and critical nicety that subtle examinations and forced constructions can not discover a doubt or a deficiency or a double meaning in any part of it. But it must have such a degree of fullness and precision, that no reasonable doubt as to the meaning and intention of the arbitrators can be entertained by intelligent men acquainted with the subject-matter." And again on page 409: "The effect of the existence of uncertainty in an award is necessarily to avoid it. In fact it renders that, which purports to be an award, no award at all. For an award is a final and conclusive determination of certain matters; an instrument, of which the force, meaning or operation are left uncertain, is not such a determination and therefore is not properly speaking an award at all."

These rules are undoubtedly correct, for the object of arbitration is to settle disputes not to foster them. If the matter by the so-called award is left just as uncertain as before, the arbitration has not only failed in its purpose but has produced trouble and costs without any beneficial results. An award of commissioners appointed to determine the rights of claimants of land under a patent ordered, that certain of the parties should hold certain of the land "according to their respective possession forever." It was held that the award was in this respect "certain to a common intent." There could be no doubt that the commissioners meant the "actual possessions" of those parties. "An actual possession, *quasi pedis possessio*, is susceptible of clear and definite proof; and no land can be conveyed by any possible mode of expression dispensing with the necessity of parol proof to locate it. This description would be sufficient in a deed, and we can not require more certainty of description in an award than what the law requires in describing land conveyed by deed." (Morse on Arb.; *Jackson* v. *Ambler*, 14 Johns. 108, Spencer, J.; *Warren* v. *Lyons*, 7 W. Va. 474.) In *Jackson* v. *Ambler*, 14 Johns. it appears that in one portion of the award the arbitrators

determined a location by corners and lines. It was argued, that two of these lines were uncertain; but apparently no evidence was introduced to establish this fact; and the court said: "This we can not say; for aught that appears both lines may be as well known, and as perfectly certain as any lines ever run. There may be marked lines at every rod's distance by the most durable monuments. It ought to have appeared affirmatively, that there were no such lines, or that they were indefinite and vague."

The original award in the case before us said: "That the true lines between said lands in dispute, are a part of a 400 pole line of said Samuel Corrothers' survey, which begins where once stood a red oak corner, now gone, and ends at dogwood pointers; second, a part of a 260 pole line of same survey which begins at a double poplar corner to Samuel Corrothers and ends at said red oak corner. And we further award that the point where said red oak stood is and shall remain a corner between said lands, and that the same is and shall remain situated exactly 400 poles from said dogwood pointers and 260 poles from said double poplar corner. And we further award, that in locating said point said parties shall be governed by the corners of Samuel Corrothers' title papers, corrected, so as to locate said corner at the point aforesaid, exactly in a straight line 400 poles from said dogwood pointers and 260 poles from said double poplar corner, and said lines shall not be varied from a direct or straight course from said corners to the angle or point aforesaid by reason of any marked trees, that may be found along or in the vicinity of said lines." The submission, which may be looked to, shows where the lands are situated, on the waters of White Day creek in Taylor county. The land which Rogers claims was formerly known as the "Matthews tract." The Corrother's land was purchased of Andrew Corrothers, and by him from Thomas Haymond. The object of the submission was to settle the boundaries, and a consequent dispute as to the true division lines between the two tracts of land. If the true corner where the red-oak stood could be located, the matter was settled. This corner the arbitrators located. They took two points, which we must regard as settled and well understood between the parties, because if there was

any uncertainty about these points, it was the duty of Samuel Corrothers in resisting the entering up of judgment on the award to have shown such to be the fact. The two points, are "the dogwood pointers," in the 400 pole line, and the "double poplar corner" in the 260 pole line, with these two points settled, and obeying the directions given in the award, any competent surveyor could not fail to locate the red-oak corner as established by the award of the arbitrators. It must be on a straight line, exactly 400 poles from the dogwood pointers, and exactly 260 poles in a straight line from the double poplar corner," and following the directions of the award the point where these straight lines projected would cross each other, is where the corner is established. Or to to speak as a mathematician would, according to the award, the red-oak corner would be found by describing a circle with the "dogwood pointers" as a center, having a radius of 400 poles, and by describind another circle with the "double poplar" corner as a center, having a radius of 260 poles, and the point, where these circles intersect, must be the location of the red-oak corner, as established by the award. For it is certain that the intersection of these circles will be 400 poles from the dogwood pointer and 260 poles from the double poplar corner; and no other point could be found, which would be at these distances respectively from these known points, in the direction indicated by the award. The award is therefore certain.

It was the second award, made after the authority of the arbitrators had ceased, which was in fact entered up as the judgment of the court, but as the awards are alike in all essential particulars save one, that in a certain contingency the plaintiffs in the court below should be restricted to their claims, and as this was put into the paper, and returned to court as the award, and as that paper is more favorable to Corrothers, the plaintiff in error, than the true award, which might have been entered up as the judgment of the court, he is not prejudiced and has no right to complain of the judgment.

It is claimed that it was error to give costs to Cochran. The judgment says Cochran was an umpire. If he was, then it was proper, that he should have costs. There was nothing in the record to show, that the arbitrators did not

choose an umpire, and that he did not sit in the case. It would, as we have seen, have been proper for him to sit with the arbitrators; but it would be more regular for him not to join in the award, unless there was a disagreement, when it would have been proper for him to have made the award himself.

There is no error in the judgment of the circuit court of Taylor county to the prejudice of plaintiff in error, and it is affirmed.

AFFIRMED.

WHEELING.

STATE v. JACKSON.

Submitted June 24, 1885.—Decided July 3, 1885.

1. In an indictment for robbery "silver coin of the value of $2.00" is a sufficient description of the property taken. (p. 253.)

2. Upon the trial of such an indictment it is proper to permit the party, from whom the coin was taken, to give evidence as to the number and value of the pieces taken (p. 253.)

The facts of the case are stated in the opinion of the Court.

W. G. Bennett for plaintiff in error.

Alfred Caldwell, Attorney General, for State.

JOHNSON, PRESIDENT:

At the December term of the circuit court of Braxton county held in 1878 Harrison Jackson was indicted for robbery in these words:

"The jurors of the State of West Virginia in and for the body of the county of Braxton and now attending the said court upon their oaths present, that Harrison Jackson on the — day of October 1878 in the said county, he the said Harrison Jackson being then and there armed with a dangerous weapon, to-wit, with a loaded pistol, on one William J. Fling,

feloniously did make an assault, and him the said William J. Fling, in bodily fear feloniously did put, and silver coin of the value of $2.00, of the goods and chattels, money and property of the said William J. Fling, from the person and against the will of the said William J. Fling, then and there to-wit, on the day and year aforesaid, in the county aforesaid, feloniously and violently did steal take and carry away, against the peace and dignity of the State."

On December 9, 1878, the prisoner appeared to the indictment and moved to quash the same, which motion the court overruled. On March 18, 1879, the prisoner pleaded not guilty to the indictment, and on the same day came the jury, and the issue being tried, the jury rendered the following verdict: "We, the jury, find the prisoner Harrison Jackson guilty, and ascertain and fix the term of his confinement in the penitentiary of this State at ten years." The prisoner moved for a new trial without stating any grounds. The motion was overruled; and on March 24, 1879, the court entered judgment on the verdict and sentenced the prisoner to imprisonment in the penitentiary of the State for ten years the term ascertained by the jury.

During the trial the prisoner saved one bill of exceptions as follows: "Be it remembered that upon the trial of this cause the State introduced one William J. Fling as a witness and proved by said witness, that prisoner took from his (witness's) person $2.00 in silver, viz: three fifty-cent pieces, and two twenty-five cent pieces. To which testimony the prisoner objected, which objection the court overruled and permitted said evidence to go to the jury. To which ruling of the court the prisoner excepted," &c. Thereupon the said prisoner asked the court for a reasonable time to apply for a writ of error, and the court postponed the execution of its sentence for thirty days.

To the judgment the prisoner obtained a writ of error.

The judgment of the court was rendered more than six years ago, and the writ of error was granted on April 5, 1879, twelve days after the judgment was rendered, and the case was submitted during the past term. The reason of the long delay, it is said, was the fact, that the prisoner had escaped jail and for years was at large but, before his case was

submitted here for decision, had been re-taken and placed in jail.

The prisoner assigns but three errors. The first is that the indictment should have been quashed. The only objection urged to the indictment is, that it does not properly describe the coin taken from Fling, the only description being "silver coin of the value of two dollars." It is insisted by the counsel for prisoner, that this is insufficient in robbery as well as in larceny. If we admit that the rule as to describing the property taken is the same in both cases, what would be the result? In Kansas it is held that an information for larceny charging the defendant with stealing "National Bank currency and United States Treasury notes of the amount and value of $164.00" was sufficient to support a judgment against the defendant. (*State* v. *Henry*, 24 Kan. 457.) In Massachusetts it has been uniformly held, that a general description of the money taken is sufficient. (*Commonwealth* v. *Sawtell*, 12 Cush. 142; *Commonwealth* v. *Duffy*, *Id*; *Commonwealth* v. *O'Connell*, 12 Allen 451; *Commonwealth* v. *Hassey*, 11 Mass. 432; *Commonwealth* v. *Green*, 122 Mass. 333; *Commonwealth* v. *Butts*, 124 Mass. 449.)

But it is needless to further discuss the question as it is at rest in this State. After a review of the authorities this Court held in *State* v. *Hurst*, 11 W.Va. 54, in which the Court approved the decision in *Commonwealth* v. *Sawtell*, 11 Cush. 142, that "divers United States Treasury notes and National bank notes and fractional currency notes amounting in the whole to $158.00 and of the value of $158.00, is a sufficient description of the property without specifying the number of the notes."

In *Moody & Roons* v. *The State*, 1 W. Va. 337, the second count in the indictment, which was for robbery, described the property taken as follows: "Thirty United States notes for the payment of divers sums of money amounting in the whole to the sum of $260.00 of the value of $260.00." The count was held good.

In the case of *The State* v. *Burk*, 73 N. C. 83, the description of the property is not given in the report, but the court said: "Unlike larceny the gist of the offence in robbery is not in the taking but in the force or terror used; and the rule

is different in the two offences both as to the value of the article taken and as to what constitutes a sufficient taking. * * In robbery the kind and value of the property is not material, because force or fear is the main element of the offence. Thus where a man was knocked down, and his pockets rifled, but the robber found nothing except a slip of paper containing a memorandum, an indictment for robbery of the paper was held to be maintainable. *Rex* v. *Bingsley*, 5 C. & P. 602."

As we have seen, that the description of the coin would have been sufficient in an indictment for larceny, it is not material to enquire whether a less complete description would answer in an indictment for robbery. We have no hesitation in saying, that, as it is a sufficient description in larceny, for stronger reasons it is good in an indictment for robbery. The indictment being good, of course there was no error in admitting the evidence of Fling as to the number and size of the silver coin taken.

The only other error assigned is, that reasonable time was not given to enable him to obtain a writ of error. This assignment of error is not insisted on in the argument. There is nothing in it, as he did not object at the time, that the thirty days given was unreasonable. It seems that it was ample, as the writ was granted before half the time had expired.

There is no error in the judgment of the circuit court, and it is therefore affirmed.

AFFIRMED.

WHEELING.

STATE *v.* ENOCH.

Submitted June 22, 1885.—Decided July 3, 1885

1. The allegation in the indictment, that the defendant "carried on the business of a druggist without a license therefor," using as it does the language of the statute is sufficient. (p. 255.)

2. The statute requiring the name of the witness, on whose evidence the indictment was found, to be stated at the foot of the indict-

ment is directory, and the omission to so state the name is not fatal to the indictment. (p. 255.)

3. To repeal a statute by implication it must appear, that the latter provision is certainly and clearly hostile to the former. If by any reasonable construction the two statutes can stand together, they must so stand. (p. 256.)

4. No druggist is authorized to carry on his business in this State without a State license therefor. (p. 257.)

5. The Pharmacy Act does not repeal the statute requiring a State license to carry on the business of a druggist. (p. 258.)

The facts of the case appear in the opinion of the Court.

V. S. Armstrong and *G. J. Walker* for plaintiff in error.

Alfred Caldwell, Attorney General, for State.

JOHNSON, PRESIDENT:

B. B. Enoch was on August 3, 1881, indicted in the circuit court of Jackson county in the following words:

"The grand jurors of the State of West Virginia in and for the body of the county of Jackson and now attending the said court upon their oaths present, that B. B. Enoch on the —— day of May, A. D. 1881, and on divers other days since that time, did carry on the business of a druggist in said county without a license therefor, against the peace and dignity of the State. Upon the information of ——— sworn in open court and sent to the grand jury to give evidence on this indictment."

The defendant demurred to the indictment, which demurrer was overruled, and, neither party requiring a jury, the case was tried by the court, and the court having heard all the evidence and arguments of counsel found the defendant guilty and entered judgment for a fine of $10.00 and the costs. The defendant moved the court to set aside the judgment and grant him a new trial, which motion the court overruled; and the defendant excepted. His bill of exceptions, which certifies all the evidence, shows that the State proved, that the defendant was carrying on the business of a druggist in the town of Ripley in said county of Jackson within a year next preceding the finding of the indictment and had no State license therefor. The defendant proved,

that during the time he carried on said business of a druggist as aforesaid he was a registered pharmacist of the State of West Virginia as provided for in the Acts of the Legislature of West Virginia of 1881, chap. 52; and that he, said defendant, presented to the county court a copy of the order of the town council of said town of Ripley giving its assent to said court to grant said defendant license to carry on the said business of a druggist during the time aforesaid, and that he, said defendant, had duly applied to the county court for a license to carry on said business of a druggist during the time aforesaid. This is in substance all the evidence heard by the court on the trial.

The bill of exceptions shows that the defendant based his motion to set aside the judgment on two grounds. First. Because said defendant was a registered pharmacist, and therefore no license was required. Second. Because if a license was required, then the county court had no discretion and was bound to grant said defendant license.

To the judgment the defendant obtained a writ of error.

No defect in the form of the indictment is pointed out. The allegation that the defendant carried on the business of a druggist without a license therefor, using as it does the language of the statute, is sufficient. (*State* v. *Riffe*, 10 W. Va. 794.)

It is true sec. 8 of ch. 157 of the Code required, that the names of the witnesses appearing before the grand jury, on whose information the indictment was found, should be written at the foot of the indictment, and the indictment in this case does not contain the name of the witness, on whose evidence the indictment was found. This requirement of the statute is directory, and the indictment is good notwithstanding the omission. (*Com.* v. *Dewer*, 10 Leigh 685; *Com.* v. *Williams*, 5 Grat. 702.) But the demurrer should have been sustained, if there was, at the time the indictment was found, no statute requiring a license to permit carrying on the business of a druggist. Sec. 1 of ch. 107 of the Acts of 1877, declares that no person without a State license therefor should "carry on the business of a druggist." That is yet the law; it was not repealed by the Pharmacy Act." Ch. 52 of the Acts of 1881. This act certainly does not re-

peal that clause of sec. 1 of ch. 197 of the Acts of 1877 in direct terms. Sec. 14 of that act declares, "That all acts and parts of acts inconsistent with this act are hereby repealed" If repealed at all then it is done by implication. Section 1 of chap. 52 of Acts of 1881 provides: "It shall be unlawful for any person not a registered pharmacist, or who does not employ exclusively as his salesman a regular pharmacist within the meaning of this act to conduct any pharmacy, drug store, apothecary shop, or store for the purpose of retailing, compounding and dispensing, medicines or poisons for medical use except as hereinafter provided." The second section declares it unlawful for the proprietor of a store or pharmacy to allow any except registered pharmacists to compound or dispense poisons, &c., for medical use; and provides a penalty for the violation of the section. The third section provides for the appointment of a commissioner of pharmacy, &c. The fourth section provides for the registration of all pharmacists, to whom certificates are granted, and provides that certain persons may be rejected without examination. The fifth relates to the examination of applicants. The sixth section provides for the examinations, &c. The seventh provides for holding rejected pharmacists liable for the quality of the drugs sold by them, and provides for a penalty for the adulteration of drugs. The eighth section declares that registered apothecaries may sell drugs, &c. The ninth places restriction on the sale of poisons, &c. The tenth section provides for the punishment of fraudulent registration and also penalty for any other than registered pharmacists selling medicines, &c. The eleventh, that the act shall not apply to physicians putting up their own prescriptions, nor to the sale of patent medicines. Section twelve provides for the investigation of complaints by the commissioner of pharmacy, and for giving information to prosecuting attorneys of all violations of the act. The thirteenth section provides for the disposition of fines when received.

If there is any section that could possibly by implication repeal the statute requiring druggists to obtain license to carry on their business, it is the eighth section, which is in full as follows:

"Apothecaries registered as herein provided shall have the right to keep and sell, under such restrictions as herein provided, all medicines and poisons, authorized by the National American, or United States Dispensatory and Pharmacopœia, as of recognized utility. *Provided*, that nothing herein contained shall be construed so as to shield an apothecary, or pharmacist who violates or anywise abuses this trust for the legitimate and actual necessities of medicine, from the utmost rigor of the law relating to the sale of intoxicating liquors; and in addition thereto his name shall be stricken from the register."

The rule of law is well settled, that to repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old, that they can not stand together or be consistently reconciled. (*Forqueran* v. *Donnally*, 7 W.Va. 114; *C. & O. R. R. Co.* v. *Hoard*, 16 W. Va. 270; *McConiha* v. *Guthrie*, 21 W. Va. 134; *State* v. *Stoll*, 17 Wall. 425; *Chew Heong* v. *U. S.*, 112 U. S. 549.) The rule as stated in 17 Wall. 425, is terse as well as sound. It is, that in such case "it must appear that the latter provision is certainly and clearly in hostility with the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, only in that event the former statute is repealed in part, or wholly as the case may be."

Now it seems to us that sec. 8 of ch. 52 of the Acts of 1881 is not certainly and clearly in hostility to the latter clause of sec. 1 of ch. 107 of the Acts of 1877, which requires a State license to pursue the business of a druggist. We think the two acts may be reconciled and may well stand together. The objects of the two acts are different; the object of the first being in part at least to produce revenue, and that of the other to restrict the sale of poisonous drugs to those who are capable of dispensing them properly. When the Legislature said: "Apothecaries registered as herein provided shall have the right to keep and sell under such restrictions, as herein provided, all medicines," &c., it is understood it was meant, "provided they had obtained license to carry on the business as required by sec. 1 of ch. 107 of the Acts of 1877." If it had been intended to repeal the law requiring license, the

Legislature would have said so. There is nothing in the act clearly repugnant to the former law forcing us to the conclusion, that the legislative intent was to repeal the law requiring a license to pursue the business of a druggist.

There is nothing in the error assigned, that the defendant had complied with all the requirements of the law necessary to obtain license as a druggist, and the county court had improperly refused to grant him a license. That is to say, that he would be justified in selling without license, if the court improperly refused to grant him license.

There is no error in the judgment of the circuit court of Jackson county, and it is therefore affirmed.

AFFIRMED.

WHEELING.

STATE v. GOULD.

Submitted June 19, 1885.—Decided July 3, 1885.

6 258
1 281

1. The first part of sec. 1, ch. 74 of Acts of 1875, which provides, "that if any person shall over-drive, torture, torment, deprive of necessary sustenance, or unnecessarily, or cruelly beat, or needlessly mutilate, or kill any domestic animal, * * * every such offender shall for every such offence be deemed guilty of a misdemeanor," creates seven separate and distinct offences of a similar character. (p. 263.)

2. No two of these several and distinct offences can be united in one count of an indictment without rendering it fatally defective. (p. 263.)

3. But the adding in any one count for over-driving, over-loading or depriving of necessary sustenance or unnecessarily or cruelly beating or needlessly mutilating or killing, the words and torture and torment or either of them, would not cause such count to be fatally defective as including a charge of more than one offence in a single count, the added words torture and torment would be mere surplusage. (p. 263.)

4. It is sufficient in describing in an indictment any five of these offences to use the words of the statute "over-drive, over-load, deprive of necessary sustenance, unnecessarily and cruelly beat,

or needlessly mutilate and kill," as the case may be, without adding the circumstances or manner, in which the act was done. (p. 262.)

5. But this would not be sufficient in describing the other two offences, torturing or tormenting, but the circumstances and the manner of the torturing or tormenting, as the case may be, must be stated, as for instance, "killed a domestic animal known as a mule by breaking its hind leg by shooting it with a ball fired from a pistol held in the hand of the accused." (p. 263.)

6. Neither the ownership nor value of the domestic animal need be stated in an indictment under this statute. (p. 264.)

7. An indictment under this statute in the following form is sufficient: "The grand jurors of the State of West Virginia in and for the body of the county of Wood, and now attending said court upon their oaths present, that Stephen Gould on October 13, A. D. 1881, in the said county, did unlawfully and wilfully and cruelly beat, shoot, torture, and otherwise ill-treat a certain beast called a mule, the owner or owners of which said mule is to the grand jurors unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." In such an indictment the words, "shoot, torture, and otherwise ill-treat" and the words "the owner or owners of which said mule is to the grand jurors unknown," are mere surplusage. (p. 265.)

8. In such an indictment it was unnecessary to allege, that the mule was a domestic animal, as the court will take judicial notice, that all mules in this State are domestic animals. (p. 264.)

9. The court in rendering a judgment upon a verdict of guilty under this statute, or in rendering judgment against a defendant in any case upon the conviction of him of any misdemeanor, has no right to add to its judgment as a part thereof an order requiring the defendant to give a bond with approved security to keep the peace or be of good behaviour and in default thereof to be imprisoned, till such bond is given. If this be done, the case on writ of error will be reversed, and the proper judgment will be entered by the appellate court without remanding it to the court below. (p. 266.)

GREEN, JUDGE, furnishes the following statement of the case:

The grand jury of Wood county on November 14, 1881, found the following indictment:

"The grand jurors of the State of West Virginia in and for the body of the county of Wood, and now attending the said court, upon their oaths present, that Stephen Gould, on

October 13, A. D. 1881, in the said county, did unlawfully and wilfully and cruelly beat, shoot, torture, and otherwise ill-treat a certain beast called a mule, the owner or owners of which said mule is to the grand jurors unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

On January 11, 1882, the defendant, Stephen Gould, moved the circuit court of Wood county to quash this indictment for errors appearing on its face and also pleaded not guilty, on which issue was joined by the State. At the April term, 1882, of said court the defendant asked leave to withdraw his plea of not guilty and to demurr to the indictment, which the court refused to allow him to do. Thereupon a jury was sworn to try the issue, who on April 12, 1882, found the defendant guilty and assessed his fine at $50.00. On the next day the defendant moved to arrest this judgment, because the indictment was not sufficient in law. He also moved the court to set aside the verdict and grant him a new trial, because the verdict was contrary to the evidence. Which motion the court overruled and rendered judgment against the defendant for $50.00, the fine assessed by the jury, and for costs; and it further ordered that the defendant enter into bond in the penalty of $500.00 with security in the like sum to be approved by the court conditioned, that the said defendant shall keep the peace and be of good behavior for the term of three years from that date, and that he be taken and kept in custody of the sheriff of said county, until such bond be given. The execution of this judgment was suspended till the first day of the next term of said court, to which time the recognizance of said defendant was enlarged.

A bill of exceptions was taken by the defendant to the judgment of the court in overruling said motions in arrest of judgment and for a new trial and the entering up of said judgment against the defendant, which bill of exceptions certifies all the evidence given at the trial. This evidence proved the following facts: In October, 1881 a mule, whose property not proven, ran down the road in front of the barn of the defendant's father in said county. The defendant called to a colored woman in the road to stop the mule, which she did, and the mule then ran into the barn-yard and then into

the barn, and the defendant with a clapboard in his hand followed the mule into the barn, and he was heard across the road striking the mule. The mule then ran out of the barn; the defendant came out of the barn and fired with a revolver at the the mule but missed it; he then fired his revolver a second time at the mule, and the ball struck it in the hind leg and broke it. The defendant attempted to have the leg set but it could not be done and the mule was killed. The defendant, when he shot the mule, was behind it and about six yards distant. The defendant obtained a writ of error to the judgment of the court.

W. L. Cole for plaintiff in error.

Alfred Caldwell, Attorney General, for State.

GREEN, JUDGE:

The first question presented by this record is: Was the indictment sufficient? The indictment is for a violation of sec. 1 of ch. 74 of Acts of 1875, passed December 22, 1875. The section is as follows:

"That if any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdrawn, overloaded, tortured, tormented, or deprived of necessary sustenance, or be unmercifully or cruelly beaten, or needlessly mutilated or killed, as aforesaid, any domestic animal, every such offender shall for every such offence be deemed guilty of a misdemeanor."

The sixth section of said act fixes as a punishment for the commission of this misdemeanor "a fine of not less than $50.00 or imprisonment in the county-jail for not more than ten days or both, at the discretion of the court together with the costs of prosecution." And there is added to this section the following clause: "And should such animal be the property of another the offender shall be liable to the owner thereof in damages in addition to the penalties herein prescribed." This clause, which was obviously an unnecessary addition, serves at least the purpose of showing beyond all dispute, that it is entirely immaterial to constitute this offence, that the accused should be the owner of the domes-

tic animal cruelly treated. The ownership of the animal is totally immaterial. It was decided in *Gise* v. *State*, 37 Ark. 456, when the statute made it a misdemeanor to needlessly mutilate or kill, &c., any living creature, that no allegation of value or ownership were essential. This is clearly so under our statute. The Attorney General in his argument says, that it has been decided over and over again, that there is no necessity under statutes similar to ours to make any allegations in the indictment whatever in relation to ownership of the animal, to sustain which position he refers to *State* v. *Brocker*, 32 Tex. 611; *Damell* v. *State*, 6 Tex. Ct. App. 482; *Collier* v. *State*, *Id.* 12; *Turner* v. *State*, *Id.* 586; *Commonwealth* v. *McClellan*, 101 Mass. 34, and *Commonwealth* v. *Whitman*, 118 Mass. 458. We have not here the Texas reports; but the two Massachusetts cases, which I have examined support the position of the Attorney General. In the first it was held, that an indictment was good, which simply alleged, that the defendant "did cruelly beat a certain horse against the peace of the commonwealth and contrary to the form of the statute;" and in *Caldwell* v. *State*, 49 Ala. the indictment was held good, which alleged that the defendant "unlawfully and maliciously disabled and injured a cow the property of John Harrison." And in *Minnesota* v. *Comfort*, 22 Minn. an indictment was held good, which alleged that the defendant with another did cruelly, wilfully and with force and arms overdrive two horses, by reason of which said overdriving the said two horses were tortured and tormented. In delivering the opinion in this last case, Gilfillan, C. J., says: "It is objected that the indictment should go beyond the words of the statute and more particularly describe what constituted the overdriving. But a charge in the indictment may be in the words of the statute without a particular statement of facts and circumstances, when by using these the act, in which the offence consists, is fully, directly and expressly alleged without any uncertainty or ambiguity. (*Commonwealth* v. *Welsh*, 7 Gray 324.) Such is the case in this indictment."

From these decisions and from the rules of pleading generally I conclude, that under our statute, which makes several distinct offences of like general character misdemeanors,

it the offence charged be overdriving or overloading or depriving of necessary sustenance or needlessly mutilating or needlessly killing, it would be sufficient in an indictment to use the words of the statute, without a particular statement of facts and circumstances, as the act, in which the offence consists, is fully, directly and expressly alleged without uncertainty or ambiguity in all these cases. But if the offence, of which the party is accused, be torturing or tormenting, the indictment would be insufficient, if it simply used the words of the statute. It should more particularly describe the acts, which constitute the torturing, or which constitute the tormenting, as the case may be. Thus in *Commonwealth* v. *Whitman*, 118 Mass. the indictment alleged, that the defendant "did torture and mutilate said cow *by then and there* beating, bruising, cutting and wounding said cow." But though our statute, ch. 74, sec. 1 of Acts of 1875, makes several distinct acts misdemeanors, and several of them could not properly be inserted in one count in an indictment, such for instance as overdriving, overloading, depriving of necessary sustenance and beating; but these, if all committed, being in their nature distinct and separate acts and constituting distinct and separate offences should be alleged in seperate counts in an indictment and not in one count. Torturing and tormenting named in said act are not in their nature distinct acts from the overdriving, overloading and others; but this torturing and tormenting may consist of the same act as one of the others, as for instance, of beating, depriving of necessary sustenance and others, so that a charge of beating, torturing and tormenting, or a charge of depriving of necessary sustenance, torturing and tormenting would be a charge of but one offence and might properly be inserted in one count in an indictment. This was held in *Commonwealth* v. *Lumpkin*, 7 Allen (89 Mass.) 579.

Tested by these principles is the indictment good in this case? In the first place there is but one count in the indictment. Is it fatally defective as charging more than one distinct offence? The charge is of beating, shooting, torturing and otherwise ill-treating. The shooting and otherwise ill-treating alleged in this indictment must be regarded as simply surplusage. If it was intended to charge the defendant with

the shooting, it should have been done in a separate count, charging him with the torturing *by* shooting. He could not properly be charged with shooting, as it is not mentioned in the statute as one of the acts, which is declared a misdemeanor. If we leave out of this indictment these surplus words, it becomes simply a charge of beating and torturing, which for the reasons we have stated is a charge of but one offence. If in one count there had been a charge of beating and torturing by depriving of necessary sustenance, this would be a charge in one count of two separate offences, and it would have rendered the indictment fatally defective. But the count being for beating and torturing charges but one offence. (*Comm.* v. *Lumkins*, 89 Mass. (7 Allen) 579.) In truth thus connected the word to turing becomes simply surplusage. Though in a separate count stating the manner, in which the torture was inflicted, torturiug would be an indictable offence.

But it is claimed, that this indictment is fatally defective in this, that the statute makes cruelly beating any *domestic animal* a misdemeanor, which offence is not charged, but the offence charged is "cruelly beating a certain beast called a mule;" and there is no allegation in the indictment that a mule is a *domestic animal*, as, it is claimed, there should have been, in order to make this indictment good. But there is nothing in this objection, as the Court will take judicial notice of the fact, that a mule is in this state a domestic animal. By the general rule with reference to what facts a court will take judicial notice of we would be bound to take notice judicially that in this State a mule is a domestic animal, and that there are no *wild* mules in the State. Thus it was expressly held in *Swartzbaugh* v. *The People*, 85 Ill. 457, that the Court will take judicial notice that in that State horses were domestic animals, and therefore in that case it was held that "an indictment for malicious mischief in wounding horses, is not bad because it fails to aver that the horses were domestic animals."

There is no objection to this indictment, as we have seen, because there is no allegation in it of the value of the mule, or who was the owner of it. No other objections to this indictment have been suggested; and we see none.

It was therefore a good indictment and the court did not err in refusing to quash it; nor did it err to the prejudice of the defendant in not permitting him to demur to this indictment; nor did it err in refusing to arrest judgment because of the insufficiency of this indictment.

The next enquiry is: Did the court err in refusing to grant a new trial, because the verdict of the jury was contrary to the evidence? As we have seen, every thing in this indictment with reference to the shooting, torturing, and otherwise ill-treating the mule must be regarded as surplusage and treated just as though nothing had been said in reference to shooting, torturing and ill-treating the mule. If the State had desired to prove these things, it should in a separate count have alleged, that the defendant tortured the mule by shooting it in the hind leg. The State not having done so, we must exclude from our consideration all that is proven with reference to the defendant's shooting this mule. When this has been done, all the evidence left pertinent to the issue is, to use the language of the bill of exceptions, "John Bartlett proved that in October last, while he was at work at the pottery just across the road from the barn-yard of defendant's father in this county, he saw the defendant and heard him calling to some one to stop a mule that was running down the road; that a colored woman turned the mule back, and it went into said barn-yard and into the barn; that the defendant with a clapboard in his hand followed the mule into the barn, and that he witness heard the defendant striking the mule in the barn but could not see him." The jury had a right to infer from this evidence, that the defendant cruelly beat this mule. He struck him blows with a clapboard, which the witness heard across the road; and though we might not infer from this evidence, that the defendant cruelly beat this mule, yet it is a mere inference of fact, and the jury having drawn it, and there being evidence from which they might not unreasonably draw such an inference, according to well established rules the court ought not to set aside their verdict and grant a new trial, because they did draw this inference. Judging from their verdict the inference would be that they regarded the evidence in relation to the shooting of the mule as irrelevant to the issue they were trying; for they

assessed the minimum fine against the defendant. If they had given consideration to the evidence with reference to the shooting of the mule, it would seem, as if they would have regarded the case as an aggravated offence and would have assessed more than the minimum fine, in which case the court might have inflicted in addition to the fine imprisonment, which it had the discretion to do.

It only remains to consider whether the court erred in adding to its judgment the order, "that said defendant do enter into bond in the penalty of $500.00 with security in the like sum of $500.00 to be approved by the court, conditioned that the said defendant shall keep the peace and be of good behavior for the term of three years from this date, and that he be taken and kept in custody by the sheriff of this county till said bond be given." In England it would seem, that such addition to a judgment for a common law misdemeanor may be made. Thus in *Dunn* v. *The Queen*, 61 Eng. C. L. R. (12 Ad. & Ell.) 1,031, decided in 1846 on an indictment for perjury a similar addition to the one in the case before us was added to the judgment. (See page 1,033.) Upon the review of this judgment by the appellate court the court by Park B. say, p. 104: "All objections taken in this case to the judgment of the court of Queen's Bench were disposed of at the time of argument, except as to one point, on which the court entertained some little doubt; whether upon a conviction for perjury, the court of Queen's Bench could add to the sentence of imprisonment, by ordering the defendant to find security for his good behavior, and for keeping the peace, and to be imprisoned till such security were found. I believe there could be no doubt if at the time of the argument we could have referred to the case of *Rex* v. *Hurt*, 30 How. St. Tr. 1131, 1194, 1344. We now find on referring to the notice of that case in the journals of the House of Lords, that the learned judges delivered their unanimous opinion in answer to a question from the House, that in all cases of misdemeanor the court might give sentence in that form. Therefore the judgment of the Queen's Bench must be affirmed."

That case was a case of a common law misdemeanor, and so also was the only other case referred to that of *Rex* v. *Hurt*. The offence in that case was the publishing in a newspaper of

libels. (See note at the end of *Dunn* v. *The Queen*, 12 Ad. & Ell. 16 Eng. C. L. R. p. 1031.) In both these cases the punishment inflicted was not fine only but imprisonment. So that despite the broad language used by the English judges the decisions in England have only gone to the extent, that, when a court renders judgment for a common law misdemeanor and inflicts on the defendant a punishment, it may in its discretion add to the judgment an order requiring the defendant to enter into a recognizance with good securities to keep the peace and be of good behavior.

In New York by statute-law every court, before which any person is convicted of a misdemeanor, has power in addition to the judgment or sentence authorized to be pronounced against him to require of the defendant to give security to keep the peace, &c., for any time not over two years, or stand committed till such security is given; but this power does not extend to convictions for libels. (2 R. S. 737, sec. 1.) With the exception of New York there is, so far as I know, no State in the Union, where the practice prevails of adding to judgments by courts for misdemeanors an order requiring the defendant to give security to keep the peace or to be of good behavior.

The Attorney General, who, as his brief shows, has made a most careful examination of all the points arising in this case, referring to many authorities refers to no authority in the United States recognizing such practice except 2 Humph. 496; and in reference to this he says: "At common law courts of record had power to require securities for good behavior or of those found guilty of *gross* misdemeanors. 2 Humph. 496." I have no access here to the Tennessee Reports, and can not say, whether this is the mere *dictum* of a judge or the decision of a Tennessee court. But I presume, that no one guilty of a statutory misdemeanor could in Tennessee under this dictum or decision upon conviction in addition to his sentence be required to give security for his good behavior or to keep the peace or a mere statutory misdemeanor could hardly be regarded as a *gross* misdemeanor. That could hardly be regarded as a *gross* misdemeanor, which the common law did not regard as deserving of any punishment. It seems to me, to be a highly objectionable practice for a court

on the conviction of a defendant for any misdemeanor whatever, whether a slight or a gross misdemeanor, to add to the judgment against him an order requiring him to give securities to keep the peace or to be of good behavior. The evidence necessary to justify the requirement of any person to give security, either to keep the peace or to be of good behavior, is so entirely different from that required to convict any one of a misdemeanor, that it would be impossible for a court from the evidence, which was given before a jury, who had found a defendant guilty of a misdemeanor, to decide whether it was right or not to require him to keep the peace and be of good behavior. In the trial for the misdemeanor no evidence is permitted to be introduced by the commonwealth except that, which tends to prove, that the defendant has committed the past misdemeanor, of which he stands charged. Now by the common law no man can be required to give sureties to keep the peace or be of good behavior, simply because he has committed a past misdemeanor. But such sureties to keep the peace could only be required of a person to protect some individual against injury, which he has just cause to fear such person intends to commit against him. Thus Hawkins states the cause, for which such surety to keep the peace may be required as follows:

"Whenever a person has just cause to fear that another will burn his house or do him corporal hurt as by killing or beating him, or he will procure others to do him such mischief, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the parties giving him satisfaction upon oath, that he is actually under such fear, and that he has just cause to be so, by reason of the others having threatened to beat him, or laid in wait for that purpose; and that he doth not require it out of malice or for vexation." Haw. b. 1 ch. 60 sec. 6. "And it seems the better opinion that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man. And the objection that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment; and yet

there is no doubt, but that one threatened to be beaten may demand the surety of the peace." Haw. b. 1 ch. 60, sec. 7.

But surety of the peace is grantable only on an apprehension of present or future danger and not for a battery, &c. that is past; in this last case the offender may be indicted. Dalton, ch. 116.

Now it seems to me obvious, that if these are the grounds, on which one can be held to surety for the peace, and this be reason, for which it should be granted, the evidence, which may be given before a jury, on which a defendant is found guilty of any misdemeanor, can never furnish to the court grounds, upon which the defendant when convicted could be legally required to give sureties to keep the peace. For any evidence to prove, that any person had just grounds to fear, that the defendant would burn his house or do him corporal hurt or imprison him or indeed do him any injury of any sort would of course never be given in the trial of any defendant for any misdemeanor; for all such evidence would be clearly inadmissible. As for instance there is not one particle of evidence of this character in the case before us; and without evidence of this character no one can legally be required to give security of the peace. It seems therefore necessarily to follow that no court can have the power to require a defendant, who has been convicted of any misdemeanor, to give security of the peace because of such conviction by adding an order, that he shall give such security, to its judgment against him on the verdict of the jury. And upon like grounds it seems to me clear, that a court ought not to have the power to demand securities for his good behavior of any one, merely because he has been convicted of any misdemeanor. The grounds upon which any person may be required to give surety for his good behavior have always been fixed by statute-law. The ancient law on that subject is thus stated by Hawkins:

"Under the Act of 33 Edw. III, ch. 1, it hath been holden that a man may be bound to his good behaviour for causes of scandal *against good morals* as well as *against the peace;* or for haunting bawdy houses with women of ill-fame, or keeping such women in his house. Then also night-walkers; eavesdroppers; such as keep suspicious company, or reported to be

pilferous or robbers; such as sleep in the day and walk at night, common drunkards; whore-masters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute as persons not of good fame." Haw. b. 1 c. 61 § 2; 4 Bluch. Com. 256.

By the 1 Rev. Code of 1819 ch. 74, persons could be required to give sureties for their good behavior *who are not of good fame*, thus leaving the law substantially as it was under 34 Edw. III, ch. 1. And to these particular cases were specified in the Rev. Code of 1819, in which sureties for good behavior might be required. And to this day the general statutory provision has remained, that persons not of good fame could be held to give surety for their good behavior, the law being unchanged by the statutes changing from time to time certain special cases specified as cases, in which a person could be required to give sureties for their good behavior. The ground, on which persons could generally be held to give surety for their good behavior, has thus always been that they were persons of bad character leading low and degraded lives. None others could ever have been legally required to give such security for their good behavior except in some special cases specified in some statute in force at the time.

Of course no evidence in the prosecution of any one for a misdemeanor could be introduced to prove that the accused was a man of bad character, or that he led a low and degraded life. Such evidence would be inadmissible in a trial of any person for a misdemeanor. It would seem therefore to follow, as it would be impossible for the court from the evidence introduced on the trial of a misdemeanor to know what was the general character of the accused, or what his general habits of life, that the court, before whom such trial for any misdemeanor however gross was had, ought not to be allowed to add to the punishment of the prisoner, if convicted by the jury, an order that he should give security for his good behavior and be imprisoned till he did so. For such a trial affords the court no opportunity of fairly judging whether such security for his good behavior can legally be required of the prisoner. Take for instance the case before us There is not a particle of evidence, which shows that the defendant

is a man of bad character. For anything, which the evidence shows to the contrary, he may be a man of excellent character, and his mode of life may be highly respectable. It may be said that in practice sureties for good behavior are often required of persons of good character. This is probably true, as there is no branch of the law, which has been as much abused as this; and very many persons have been illegally required to give security for their good behavior. But this is but an additional reason, that we should do what we can to stop the abuse of law, which, if administered in proper spirit, is a great protection to the community; but which because of its indefiniteness is in its administration often grossly abused. Our existing statute-law gives no countenance to this rendering a law intended for the protection of a community a means of gross oppression. Our Code ch. 153 p. 702 authorizes no one but persons not of good fame to be required to give securities for their good behavior except in a very few cases set out specifically in the statute-law. (Code ch. 153, §§ 1, 9, 11.)

So far as I know or ever heard till now, it never has been a practice in this State or in Virginia for the circuit court to require surety of the peace or of good behavior of defendants convicted of misdemeanors however gross. And it seems to me that to permit the courts to add to the sentence of a defendant convicted of any misdemeanor an order requiring such sureties would violate the provisions of ch. 153 of the Code. If such bonds are under such circumstances ever allowed to be required by the circuit courts, they must be required, simply because the defendant has committed a gross misdemeanor, and this is never a ground for demanding such bonds and securities.

The circuit court therefore had not the right to add to its judgment this requirement, that the defendant should give such bonds with security to keep the peace and be of good behavior, and that he should be confined in jail, till such bond was given. It had no power except to enter up judgment for the $50.00 fine, which the jury had assessed, and it might if it had thought proper, have added to the punishment of the defendant imprisonment not exeeeding ten days. But the court was of opinion, that the fine of $50.00 was sufficient punishment for the offence, which had been committed,

and did not add any imprisonment thereto. Of course this addition of requiring him to give bond and security to keep the peace and be of good behavior could not have been intended as any part of the punishment for the misdemeanor, which he had committed, but was merely to prevent the commission of future offences. This he had no right to do as an addition to the judgment he rendered in this case.

This judgment must therefore be set aside and reversed; and this Court must enter up such judgment on this verdict as the court below should have entered up, that is, that the State of West Virginia recover against the defendant below the sum of $50.00 the fine by the jury assessed in their verdict and its costs by it in the prosecution of this case in the circuit court of Wood county expended. If the circuit court had not by the judgment it has entered shown, that it did not deem that any imprisonment should be added as a further punishment of the defendant, we should have deemed it necessary to remand the case to the circuit court to enter up the proper judgment, as the court below has the discretion to add this imprisonment, if it deems proper, and not this Court. But as the court below has in effect said, that no such imprisonment should be added, we deem it unnecessary to remand the case, and enter up the proper judgment here.

REVERSED IN PART. AFFIRMED IN PART.

WHEELING.

STATE v. FOSTER.

Submitted June 23, 1885.—Decided July 3, 1885.

1. An indictment under sec. 7, ch. 149 of Code, which avers, that the defendant did lewdly and lasciviously associate and co-habit with one S. F., the defendant and said S. F. not being then married to each other, is fatally defective, because it fails to aver that said parties so associated and co-habited *together* or with each other.

2. The principles and decision announced in *State* v. *Foster*, 21 W Va. 767, approved and re-affirmed.

A sufficient statement of the facts of the case will be found in the opinion of the Court.

J. M. French for plaintiff in error.

Alfred Caldwell, Attorney General, for State.

SNYDER, JUDGE:

Writ of error to a judgment of the circuit court of Boone county, rendered April 17, 1882, against James Foster, the plaintiff in error, upon an indictment for a misdemeanor.

The defendant demurred to the indictment, the court overruled his demurrer, and upon the plea of not guilty the jury found against him and fixed his fine at $52.00. No bill of exceptions was taken. The indictment avers: "That James Foster on December 1, 1880, and from that day to November 1, 1881, in the county aforesaid, did lewdly and lasciviously associate and co-habit with one Sarah Foster, the said James Foster and Sarah Foster during all the time aforesaid not being married to each other, against the peace," &c.

This indictment is evidently founded on sec. 7 of ch. 149 of the Code, which declares that: "If any persons not married to each other lewdly and lasciviously associate and co-habit together * * * they shall be fined not less than $50.00," &c. In commenting upon this statute, this Court in *State* v. *Foster*, 21 W. Va., 767, 770, says: "To constitute the offence, with which the defendant is sought to be charged in said indictment, it is not sufficient, that he and said Sarah Foster not being married to each other, during such association and co-habitation should so associate and co-habit *together*, but it is essential, that *both* he and the said Sarah Foster *should lewdly and lasciviously co-habit together*," and that they should both have the same common purpose and intent; for, if this purpose and intent were present in the mind of one, and wholly absent from the mind of the other, then it cannot be said that *both* "lewdly associated and co-habitated together," and therefore they cannot be guilty of the offence of "lewdly associating and co-habiting together," described in said clause of said sec. 7 of ch. 149." The Court, therefore, held that the indictment in that case was fatally defective and that the circuit court erred in overruling

the demurrer to it. An inspection of the indictment in that case will show that its averments are precisely the same as those in the indictment in the case at bar. They are both identical in form and substance; consequently the principles decided and conclusion announced in that case fully determine and settle this case. It is, therefore, only necessary to state here that we approve the principles and decision announced in that case, and re-affirming the same we must reverse the judgment of the circuit court in this case, sustain the demurrer to the indictment and discharge the defendant.

REVERSED. DEFENDANT DISCHARGED.

26 274
34 40
34 172
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37 610
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WHEELING.

DANKS *v.* RODEHEAVER *et al.*

Submitted June 12, 1885.—Decided July 3, 1885.

1. If errors or supposed errors are committed by a court in its rulings during the trial of a case by a jury, the appellate court can not review these rulings, unless, first, they were objected to when made and the point saved and a bill of exceptions taken showing these rulings during the term of the court, and unless, second, a new trial was asked of the court below and refused, and such refusal objected to in the court below, and this appears of record. If either of these essentials is omitted, the appellate court can not review the rulings. It can not review them, unless bills of exceptions were taken to them as above stated, and a new trial was asked and refused, though a bill of exceptions was regularly taken to such refusal, and in this bill of exceptions these rulings of the court during the trial are fully stated, and it appears, that they were erroneous, and that these erroneous rulings caused the jury to find the verdict, which they did find. Nor can the appellate court review such rulings by the judges during the trial in any case, though they were excepted to when made, and regular bills of exceptions were then taken, if no new trial was asked in the court below and refused, and such refusal objected to, and this be noted in the record. (p. 276.)

2. *Core* v. *Marple*, 24 W. Va. 354, approved and also points 2 and 3, in syllabus of *State for use, &c.* v. *Phares*, 24 W. Va. 657–8.

GREEN, JUDGE, furnishes the following statement of the case:

This was an action of ejectment brought in the circuit court of Preston in September, 1880, by Joseph Danks against Isaac Rodeheaver and Ami Frankhauser to recover a certain tract of land in said county described by metes and bounds, and which the plaintiff claims he was possessed of in fee, and on which the defendants entered, and the possession of which they unlawfully withheld to his damage. The defendants pleaded not guilty, and issue was joined on this plea. An order of survey was made by the court. On December 2, 1882 a jury was sworn to try this issue; and on December 4, 1882 they found a verdict for the plaintiff for the land in the declaration mentioned, describing it by metes and bounds; and they further found, that the plaintiff hath title in fee simple to said land, and also found for the plaintiff one cent damages. Thereupon the court rendered a judgment, that the plaintiff recover from the defendants the possession of the premises according to this verdict of the jury together with his damages aforesaid and his costs. During the trial of the case the defendants took two bills of exceptions. The first was to the fact that the court permitted the plaintiff to offer as evidence of his title a certified copy of a deed, which had been transcribed on a record-book of the said county in the office of the clerk of the county court, which deed had been recorded on an acknowledgment thereof before the deputy-clerk of said court in said clerk's office. The second was to the refusal of the court at the instance of the defendant's counsel to instruct the jury "that the deed dated January 12, 1853, did not invest the grantee with the title to the real estate therein described." The record does not show that any motion was made by the defendants for a new trial because of these supposed errors on the part of the court during the trial of the case or for any other reason.

A writ of error and *supersedeas* was allowed to the judgment of the circuit court in this cause rendered December 4, 1882.

Berkshire & Sturgiss for plaintiff in error.

John Barton Payne for defendant in error.

GREEN, JUDGE:

The first question in this case is: Has this Court jurisdiction to decide the questions arising during the trial of this case, which were made parts of the record by regular bills of exceptions signed by the circuit judge setting out his rulings in the case during the trial before the jury admitting the testimony objected to by the counsel for the plaintiff in error and refusing to grant instructions asked by the plaintiff in error, as the plaintiff in error did not ask the court to grant him a new trial but apparently acquiesced in the verdict of the jury, on which the court below entered up the judgment of December 4, 1882, which is now for the first time complained of in his petition for a writ of error presented to this Court? The writ was awarded by the Court and the question is: Ought not this court to decline to consider these rulings of the circuit court during the trial of the case. If the decision of this Court in *State* v. *Phares*, 24 W. Va. 657 decided last September be followed, the rulings can not be reviewed by this Court (syllabus 3 p. 657.) This Court shortly before that on June 28, 1884, in the case of *Core* v. *Marple*, 24 W. Va. 354 decided also that "when an instruction is given the to the jury without objection at the time, and no exception or notice of exception is taken or given before the verdict is returned by the jury, the giving of the instruction can not be a ground for setting aside the verdict and granting a new trial." Much of the reasoning, which sustains either of these decisions, will also sustain the other; and on the other hand many of the objections urged against either of these decisons could be urged as objections to the other. So that these two decisions must both be upheld or overthrown. The principle to be deduced from these two cases in 24 W. Va. is that *if errors or supposed errors of any sort are committed by a court in its rulings during the trial of a case by a jury, the appellate court can not review these rulings, unless first they were objected to when made, and the point then saved, and a bill of exceptions taken showing these rulings during the term of court, and unless, second, a new trial was asked of the court below and refused, and such refusal objected to in the court below, and this appears of record.* If either of these essentials is omitted, the appellate court can not review these rulings. It can not review them, unless

bills of exceptions were taken to them as above stated, even though a new trial was asked and refused, though a bill of exceptions was regularly taken to such refusal, and in this bill of exceptions these rulings of the court during the trial are fully stated, and it appears that they were erroneous and that these erroneous rulings caused the jury to find the verdict they did find. Nor can the appellate court review such rulings by the judge during the trial in any case, though they were excepted to when made, and regular bills of exception then taken, if no new trial was asked in the court below, refused, objected to and this be noted in the record.

We are asked to reconsider the principles settled by these two cases in 24 W. Va., because it is claimed that it is not regarded as a correct principle of practice by the bar of this State, who have considered that these errors of the judge arising during the trial of the case would be reviewed in every case, when the record in any manner showed, that these errors had been committed, and that they were prejudicial to the plaintiff in error, a principle, which, it is claimed, prevails universally in other States. As all the text-books are entirely silent on this subject, it is very natural, that the members of the bar should take up the idea, that this silence was produced by a general admission of the correctness of the principle, on which they claim that the bar of this State had always acted. As this question is a very important one, and so little bearing upon it has been found, we have concluded that we would review the principles settled in these two cases in 24 W. Va.

While the text-writers are silent on this question, yet they state as one of the grounds, on which new trials are granted, the misdirection of the judge during the progress of the trial (see for instance Hillard on New Trials, ch. 2, § 3, p. 24 of 2d Edition;) which would seem to indicate a practice of asking the court below for a new trial because of improper rulings of the judge during the trial; and this would seem to justify the inference, that the asking of such new trial because of such erroneous instruction was proper if not absolutely necessary. If the appellate court could properly review a case because of such erroneous instructions made a part of the record without any new trial having been asked

of the court below, it would seem to be useless to ask such new trial for such cause; and the fact, that this practice generally prevails, would indicate a belief on the part of the bar generally, that the appellate court could not review a case because of such erroneous instructions appearing of record, unless there had been a motion made for a new trial. The reason, I presume, why nothing is said by the text-writers directly on the subject is, that most of the reports of cases, wherein it is presumed, that this question arose, are so briefly and imperfectly reported, that it can not be said with any certainty, whether this point arose, and when we conclude, that it did probably arise, the court in their opinion say nothing directly on the subject; and it would be unsafe to draw any inference from their decision in the case, as long as there is uncertainty as to whether bills of exceptions were taken at the trial to erroneous rulings of the court, or whether these erroneous rulings appear only in the bill of exceptions refusing or granting the new trial; and it would be equally unsafe to draw any conclusion, where there is an uncertainty whether a motion for a new trial was made. In many of the reported cases these uncertainties exist, it not satisfactorily appearing either from the statement of the case or from the opinion of the court in what form the questions discussed arose. There are many such cases, in which the question, which we are considering, probably arose, but in what form we can not certainly say; and the opinion of the court is so brief and unsatisfactory as to render it unsafe to draw any inference as to their views on this question. The following are some of the many cases of this character: *Bowyer* v. *Chesnut*, 4 Leigh 1; *Thompson* v. *Cummings*, 2 Leigh 321; *Brown* v. *McAllister et al*, 39 Cal. 573; *Dedo* v. *White, Administrator of Fisher*, 50 Md. 242; *Carlin* v. *Chicago R. I. & P. R. R. Co.*, 31 Ia. 371; *Deves* v. *Heiner*, 19 Ia, 297; *Durrance* v. *Preston*, 18 Ia. 402.

We might cite many other cases of this character. The reports are full of them; in most of them the court say nothing on the question we are considering. It may be that their decision involved a judgment on the question; but whether it did so or not, or what were their views, we can not infer with any certainty, because we can not find out

from these reports with any certainty how the questions discussed came before the court whether simply on a bill of exceptions taken to the ruling of the court during the trial at the time such ruling was made, or whether the supposed misruling only appeared in a bill of exceptions on the motion for a new trial. In very many cases we can not tell with any certainty, whether there was or was not a motion for a new trial. In some of the cases the court in its opinion expresses views, which apparently bear on the question; but the true significance of what is said can not be known with any certainty, because we can not say whether bills of exceptions were taken at the time to rulings of the court during the trial, or in some cases whether motions for a new trial were or were not made. Thus in *Durrance* v. *Preston*, 18 Ia. 402, the court say:

"The plaintiff in his petition sets out as one ground of new trial, that the court mistook the law as applied to the set-off and defence of the defendant in said action. The petition sets out all the proceedings at length, and all the instructions given are copied into the petition, but it does not appear that any of them were accepted to by either party, nor is there any averment that they were. Error of law, occurring at the trial, is no ground for a new trial, unless excepted to by the party making the application."

If an application for a new trial was, as is very probably the fact, made in this case to the court below, and the instructions given set out in a bill of exceptions to the refusal to grant a new trial, then this case is an authority in favor of the decision of this Court in *Core* v. *Marple*, 24 W. Va. 354, where it was held, that "when an instruction is given to the jury without objection at the time or notice of exception is taken or given before the verdict is returned by the jury, the giving of the instruction can not be a ground for setting aside the verdict and granting a new trial of the case." But if on the other hand no new trial was asked in the court below but only in the appellate court, then of course this decision would not support the decision in *Core* v. *Marple*. Now whether the new trial was asked for of the court below or only of the appellate court does not appear. The apparent inference would be, that it was asked of the court below. But it is not so stated; on the contrary the statement of the case shows,

that a verdict and judgment was rendered at the March term, 1861, and "on July 22, 1861, the plaintiff filed his petition for a new trial." It is not stated, whether he filed it in the court below or the appellate court. He could not in July have asked in this State a new trial at all in any court, the judgment having been rendered in March. And it must be under some statute-law of Iowa that he was allowed to ask a new trial at all in July. But of what court he is permitted after judgment to ask a new trial does not appear in the report of this case. Hence we can draw no safe conclusion on the question under discussion from this decision.

Again there are decisions on the question under discussion, which are entitled to no weight with us, because they were evidently influenced by statute-law peculiar to the State where the decision was rendered. Thus in *Klein* v. *Franklin Insurance Company*, 13 Pa. St. 249 the court say: "But the least founded of all is the assignment that the judge overruled the defendant's motion for a new trial. It is not pretended, that this would be ground for a writ of error at the common law; but the act, which has put the *nisi prius* on the footing of an independent court with power to give judgment, provides that either party may take a bill of exceptions to the opinion of the judge as in the common pleas; and that 'whenever the said judge shall refuse to grant a new trial *on points of law* or whenever either party shall tender a bill of exceptions as aforesaid, or any case in the said court where a writ of error is now allowed in a like case to any court of common pleas or district court, it shall be lawful for the party aggrieved to require the said judge to grant an order to certify the record and bill of exceptions or either of them as the case may be to the supreme judges in bank.' By this, two ways are provided to bring the law of the case before this Court. The first by bills of exceptions to the rulings of the judge at the trial; and the second by a certificate of his decision on the propriety of these rulings. A party may take either of them but not both for the one must be superfluous. Here the defendant took bills of exceptions. He still held his motion for a new trial but only for error committed by the jury, and on that head the decision of the judge was conclusive. It was not intended that a party should open the

merits of his case to bank on an ordinary motion for a new trial."

This decision can of course be of no weight in this State where there is no such statute, and where unquestionably the court below can grant a new trial for misdirection to the jury or for errors of law committed by the court during the trial; and if he fails to do so, his refusal to grant a new trial for such misdirection may unquestionably be reviewed by this Court.

There are also decisions to be found, which, though apparently based on no statute-law, are nevertheless so utterly variant from the established law as recognized by all in this State, as to indicate, that the practice in the State, where such decisions were rendered, is peculiar to such State, and that such decisions, though they might be regarded as bearing on the question we are discussing, are entitled to no weight with us in reaching a conclusion. Thus in *The State* v. *Call*, 14 Me. 421 it was decided, that "when a party in the court of common pleas files exceptions to the opinion of the judge and at the same time moves for a new trial for alleged misconduct of the jury, the judge has a right to require such party to make his election to insist upon his exception or to rely on his motion; and his election to proceed on his *motion for a new trial* is a waiver of his right to except to any decision of the judge *during the trial of the action*." There was no opinion rendered in this case; but the decision can have no weight with us; for nothing is more common in this State than for a party to except to the decision of the judges or rulings *during the trial* and also to move for a new trial and, if it be refused, to obtain a writ of error. The appellate court constantly reviews the case on a motion for a new trial, and it is so far from a waiver of his bill of exceptions, taken during the trial, that we constantly hold such misdirection during the trial, which was duly excepted to, to be often a ground for reversing the court below for refusing to grant a new trial. Though the court in this Maine case gave no opinion, yet it waived the decision of the question, whether the appellate court could grant a new trial on exceptions to the decisions of the court of common pleas denying such motion. No one in this State would for a moment call in

question the right of this Court to grant a new trial on exceptions to the refusal of the court below to grant such new new trial. It is a constant practice here for the appellate court to review the decisions of a court below refusing to grant a new trial, when the point has been properly saved by a bill of exceptions. The discretion of a court below to grant or refuse a new trial is a discretion, which may be reviewed by the appellate court; and such reviews are constantly occurring. This decision is therefore entitled to no weight with us on the question we are considering.

I have found two decisions which are inconsistent with the following decision of this Court in *State* v. *Phares*, 24 W. Va., 657, point 3 of the syllabus: "In a case tried by a jury, no matter how many exceptions are taken to the rulings of the court made during the trial, unless a motion is made during the trial-court to set aside a verdict, and that motion is overruled, all such errors saved will by the appellate court be deemed to have been waived." The two cases, to which I refer, as reported show, that no new trial was asked of the trial-court, and yet the appellate court did consider exceptions taken to the ruling of the court below during the trial, implying by so doing that they did not regard such exceptions as waived by the failure of the party to ask a new trial. But in neither of the cases does the question, whether the court, when no motion for a new trial had been made, could properly review the rulings of the court below during the trial, which had been properly excepted to at the trial of the rulings, appear to have been discussed. In the absence therefore of the reasoning or discussion of this question the fact, that the court of appeals assumed, that it had a right to review these rulings made during the trial, is entitled to much less weight with us, than if the question involved in them had been considered by the courts and a conclusion reached, after the reasons, which might have led the court to its conclusion, had been stated. The two cases, to which I refer, are *Boyle* v. *Levings*, 28 Ill. 316-7 and *Jamison* v. *Moore*, 43 Miss. 600. In both of them there were motions for new trials in the court below; but they were not properly made parts of the record and were for that reason regarded as no part of the record in the appellate court. This fact however may

have had some influence with the appellate court in considering instructions at the trial, which had been excepted to and partly made a part of the record. I have the more reason for thinking that in Mississippi the law is not settled, that rulings of the court below during the trial excepted to at the time and properly made a part of the record will be reviewed, when no motion for a new trial has been made in the court below, despite this apparent assumption; for I find it said in a case in the same volume:

"The record must contain the instructions given and refused (41 Miss. 104) with the certificate of the clerk, that they were so given or refused and also the award or denial of a new trial. It is the office of a bill of exceptions to present the objections and exceptions with the facts bearing on the particular action and the grounds of the motion for a new trial."

But it would be perhaps an improper inference, that this decision was inconsistent with what seems to have been assumed to be the law in *Jamison* v. *Moore*, 43 Miss. 598, as in the case of *Fisher* v. *Fisher*, 43 Miss. 214 it does not appear an exception was taken to the instructions given by the court below or any exception to the awarding of a new trial by the court below.

But in *Wells* v. *Moseley*, 4 Cold. 401, it was expressly held that "If it appears upon the face of the record, that the court below has committed an error, the appellate court will reverse the judgment and award a new trial, whether it was asked for in the court below or not." There is no authority referred to by the court to sustain this decision, nor was there any reasoning by the court to show its propriety. It was simply announced as the conclusion of the court. The case was one of an instruction improperly given by the court below to the jury, which was excepted to at the time and properly made a part of the record, and no new trial was asked. So that the question we are discussing was directly raised in this case and decided contrary to our decision in the case of *State* v. *Phares*. But the Tennessee court gave no reason for its decision and referred to no authorities. This is the only case, which I have found in direct opposition to our decisions where the attention of the Court was called to the question. But on

the contrary I have found numerous cases in other States, which expressly approve the decision on this question in *State* v. *Phares*. Thus in *Staver, Administrator et al.* v. *The State ex rel*, Munford, 61 Ind. it was decided, that "The supreme court can not review a question of law reserved during the trial of a cause, unless the error complained of is made a ground for a motion for a new trial." This not only sustains our decision but the syllabus we have quoted goes even further, as it apparently requires not only a new trial to be asked but to be asked specially on the *ground* of this misdirection. On this subject the court say on page 362: "No motion however seems to have been made for a new trial in the court below. It has been held by this court, and we think correctly, that a motion for a new trial is necessary, to enable this court to review a question of law arising upon the trial like the one before us. (See *Love* v. *Carpenter*, 30 Ind. 284; *Garver* v. *Daubenspeck*, 22 Ind. 238.")

This case shows that the supreme court of Indiana has formally settled the law in that State in accord with our views on this question as decided in *State* v. *Phares*. The law is well settled in the same way in Arkansas. Thus in *Grimes and wife* v. *Summers*, 39 Ark. 482 it was decided: "All errors in proceedings at law, which might be remedied by a new trial, are waived, unless they are made grounds of a motion for a new trial, and the motion incorporated in the bill of exceptions or referred to therein as elsewhere copied in the transcript. When this is not done such errors are not before the supreme court." The court say on page 484: "This court has often held that all errors occurring in the course of proceedings at law, which might be remedied by a new trial, are waived, unless they be made grounds of a motion for a new trial, and that motion must be set forth in the bill of exceptions or referred to therein or elsewhere copied in the transcript. If that be not done, no errors occurring in the progress of the trial or in any manner affecting it can be noticed here. Of this nature are errors in the refusal of continuances, in suppressing or refusing to suppress depositions, in giving or refusing instructions, in verdicts and many others of like nature, which a new trial would reach and remedy, as disdinct from errors apparent on the record proper; mean-

ing thereby the record required to be made in case no bill of exceptions has been taken. * * We have not overlooked the fact that, in the record proper a motion is copied in full in connection with the proper notation on the record, that a motion for a new trial was made and overruled. But it is not the province of the ordinary record to set forth the motion itself with its grounds; and to make it a part of the record, it must be brought by bill of exceptions, either incorporating it, or referring to it as contained in some other part of the transcript. *Carroll* v. *Saunders*, and cases cited 38 Ark. 216; *Fry & Co.* v. *Ford*, *Id.* 246; *Knox* v. *Hellums*, *Id.* 413."

In accord with this decision *Young*, *Trustee* v. *King*, *et al*, 33 Ark. 745; *State* v. *Mahon*, 26 Ark. 536; *Merriweather* v. *Erwin*, 27 Ark. 37; *Worthington* v. *Welsh*, 27 Ark. 464; *Hick* v. *Wilson*, 24 Ark. 628; *Moss*, *Administrator* v. *Smith*, 19 Ark. 683.

The same is the well settled law in Kentucky. Thus it was decided in *Humphreys* v. *Walton & Co.*, 2 Bush 580 that "On an issue and trial of facts by a jury or the court a motion for a new trial is essential to correct the errors growing out of the evidence or *instructions* before an appeal can be entertained by the court of appeals." On page 582 the court say: "If a party in whom no right of action exists should bring a suit, and this be apparent from his own petition, and the defendant should fail to answer, and judgment by default be rendered, yet he might have a reversal without any motion for a new trial, and many other cases of errors appearing in the record; but on an issue and trial of facts by a jury or the court a motion for a new trial is essential to correct the errors growing out of the evidence or instructions before an appeal can be entertained by this court." The same conclusion was reached in *Dethrage* v. *Montgomery*, 4 Bush 46; and the same conclusion was again reached in *Harper* v. *Harper*, 10 Bush 447; and it was further decided that "on a motion for a new trial the court should review all its rulings excepted to by the unsuccessful party and if error has been committed to his prejudice, grant a new trial; and a refusal to do so in such case will be error for which the order will be reversed and the case remanded for a new trial." The court say on page 451: "When an appeal is prosecuted from a judgment on a verdict

without a motion for a new trial having been made and overruled nothing is brought before this court except the pleadings, verdict and judgment; and if the pleadings and verdict authorized the judgment rendered, it will be affirmed without regard to the rulings of the court at the trial further than they appear in the judgment. But when a motion for a new trial is made it is the duty of the circuit court to review all its rulings during the trial which is excepted to by the unsuccessful party, and grant a new trial if error has been committed to his prejudice; and if the court fails to do so and overrules the motion, the order will be erroneous because of the previous errors, and this court will reverse the order, and remand the cause with directions to award a new trial."

In Missouri they have gone further than we did in *State* v. *Phares*. Thus in *Lancaster's administrators* v. *Washington Life Insurance Company*, 62 Mo. 127, it was decided, "that if objection were made, and exceptions saved to the admission of some testimony introduced by the plaintiff but the action of the court in giving and refusing instructions was the only error complained of, which was brought to the attention of the court below in the motion for the new trial, then the propriety of the admission of the testimony excepted to but only the propriety of the courts action in granting or refusing the instructions excepted to can properly be reviewed in the appellate court on a writ of error by the plaintiff."

In this State on the decision of *State* v. *Phares*, 24 W. Va. p. 657, point 3 syll., taken in connection with *Shrewsbury* v. *Miller et al*, 10 W. Va. 115 point 4 syll. it would be held, that, if a motion for a new trial is made and overruled, then this Court would review all the rulings of the court during the trial prejudicial to the plaintiff in error, though the attention of the court was not called to some of them by the plaintiff in error in making his motion for a new trial. In this respect our law according to these decisions would be the same as the Kentucky law as laid down in *Harper* v. *Harper*, 10 Bush 447, point 2 syll., that is, on a motion for a new trial the court below should review all its rulings during the trial excepted to by the unsuccesful party, whether specially called to its attention or not; and, if there be such error prejudicial to the plaintiff in error and the court below

has refused to grant him a new trial, this Court would reverse the judgment. And in such case it would only be necessary for the record-book to show, that a motion for a new trial was made by the plaintiff in error and overruled, and such action objected to in order to bring before us for review all the rulings of the court during the trial excepted to by the plaintiff.

In this State in this respect our practice would be different from that in Arkansas as laid down in *Gates and wife* v. *Summers*, 39 Ark. 482. There in such case rulings during the trial excepted to could not be reversed, though a motion was made for a new trial and overruled, which was entered in the record-book, unless the plaintiff went further and took a formal bill of exceptions. Here in such case this formal bill of exceptions would not be necessary, first, because on the motion for a new trial being made it would be the duty of the court below to review all these rulings made during the trial, which it would not be in Arkansas, unless they were specially named in the motion as grounds for granting the new trial; and secondly, because our statute-law provides, that a "party may avail himself of any error appearing on the record, by which he is prejudiced, without excepting thereto." (Code, ch. 131, § 9.) By this is meant, "without taking a formal bill of exceptions." And if the record showed that the new trial was refused and the plaintiff in error excepted or objected thereto, this would suffice. *Sweeney* v. *Baker*, 13 W. Va. 158; *Perry* v. *House*, 22 W. Va. 383.) If the other side wished to show, that though the ruling of the court during the trial was excepted to by the plaintiff in error, yet upon the whole case, as it was before the jury, the plaintiff in error was not prejudiced, it would be the duty of the defendant in error to have all the evidence certified and inserted in a formal bill of exceptions, or certificate by the judge of all the evidence or facts given so as to make such evidence a part of the record. *Sammons & Piercy, Ex'rs* v. *Hawver*, 25 W. Va. 678.

It seems to me very obvious that outside of Virginia and West Virginia the great weight of authority sustains the views of this Court as expressed in *State* v. *Phares*. In the conclusion of the opinion President Johnson in that case

says: "Of course the rule is different, if the error is in the pleadings." Several of the cases we have cited point out this difference, and it is also pointed out in *Robinson* v. *Clarkson et als.* 34 Mo. It is also true that authorities outside of Virginia and West Virginia sustain the decision of this Court in *Core* v. *Marple*, 24 W. Va. 354, that "when an instruction is given to a jury without objection at the time, and no exception or notice of exception is taken or given, before verdict is returned by the jury, the giving of the instruction can not be a ground for setting aside the verdict and granting a new trial in the case." It is true, it was held otherwise in *Bengley* v. *Denson*, 40 Tex. 416, where it was decided, that "though an appellant, who has failed to object to an instruction, can not generally avail himself of error in the charge on appeal, yet, when the verdict of the jury has been made to turn upon an erroneous charge, and the judgment upon the merits is thus founded in error, it will be reversed, though the charge was not complained of at the time." But the reasons assigned by the court for this conclusion seemed to me to be almost unintelligible. All that is said on this point is this: (page 433.) "Appellee refers to numerous decisions of this court as sustaining his position, that appellants having failed to object to the charge at the time it was given, it can not now be made a ground to reverse the cause. This has been the general practice of this court where the charge is unexceptionable. But when 'the verdict of the jury has been made to turn upon an erroneous charge, and the judgment upon the merits is thus founded in error, the judgment will be reversed, though the charge was not complained of at the time as in *Hollinsgworth* v. *Holshousen*, 17 Tex. 47; *Wetmore* v. *Woodhouse*, 10 Tex. 33.'"

The cases referred to by the appellee as sustaining his position, that the appellants having failed to object to the charge at the time it was given, it can not now be made a grouud to reverse the cause, were *Hall et al* v. *Stancell*, 3 Tex. 400; *Houston* v. *Janes*, 4 Tex. 170; *Jones* v. *Thurmand*, 5 Tex. 323; *Thatcher* v. *Mills*, 14 Tex. 16; *Comm.* v. *McKee*, 14 Tex. 30; *Earle* v. *Thomas*, 14 Tex. 593; *Hollingsworth* v. *Holshousen*, 17 Tex. 47; *Bart* v. *Alford*, 20 Tex. 229; *Robinson* v. *The State*, 24 Tex. 154; *Powell* v. *Huling*, 28 Tex. 56; *Wright* v.

Donnell, 34 Tex. 305; *Robinson* v. *Carroll*, 16 Tex. 383. In answer to this array of authorities the appellants counsel only say, page 432: "Rule VII adopted by this court at its January term 1840 prohibits in this court 'any objection to be taken to the admissibility, as evidence, or any deposition, deed, grant or exhibit, &c., unless objection was taken in the court below' was never meant to be applied to objections apparent on the face of the record. Such was the construction given to this rule in *Cloud & Smith*, v. *Adriance*, 1 Tex. 106. The present rule, adopted on the same subject by this court is identical in terms (see Rule V., 32 Tex. 808) and should not be construed to apply to instructions of the court clearly erroneous." This seems to me to be subtantially an admission that the Texas authorities clearly establish the position "that the appellants having failed to object to the charge at the time it was given, it can not in the appellate court be made a ground to reverse the case." And that is the well established law in Texas, it seems to me, is in effect admitted by the court, when it said: "This has been the general practice in this court, when the general charge is unexceptionable." Unless the practice was absolutely absurd, it must have existed and been applied, when the "general charge was exceptionable;" for it it is applied only when the "general charge was exceptionable" it would in effect fail to be applied, whenever its application could possibly produce any effect. I have no access to any of the Texas reports here except this 40th volume; but I have no doubt, that they clearly establish the rule, "that if the plaintiff in error fails to object to an instruction at the time it is given on the trial of the case below, the appellate court can not reverse the case, because this instruction is erroneous."

The two cases referred to above in this case in 40 Texas are doubtless in irreconcilable conflict with a long current of decisions by the supreme court of Texas. We will presently see, that the same thing has occurred in Virginia that occurred in Texas; and two cases will be found in Virginia in irreconcilable conflict with a long current of Virginia decisions, which established the law, just as the current of the decisions settled it in Texas. These are but examples of what sometimes occurs, when appellate courts in order to do

what justice seems to require overthrow established law. They are causes where the appellate court seeing that the ignorance or carelessness of counsel had lost rights of their clients in the court below, in order to prevent such a result, violate a long established and just rule of practice. The Supreme Court of the United States in *Railway Company* v. *Twombly*, 100 U. S. 78 decided, that " where a party moving for a new trial assigns as reason therefor, that the verdict is not sustained by the evidence, and that the court erred in giving certain instructions and in refusing others; but he did not at the time except to the ruling of the court in regard to the instructions, they can not be reviewed by the appellate court, although they are incorporated in the bill of exceptions allowed on the refusal of the court below to grant a new trial."

I will now review the cases in Virginia and West Virginia on the questions, which we have been considering, and show, that, while there has been some conflict in these cases in Virginia, the decided weight of authority in that State support these decisions in *Core* v. *Marple*, 24 W. Va. 354, and *State* v. *Phares*, 24 W. Va. 657, point 3 syll. The first case in Virginia on the subject under discussion was decided in 1790; and it is the second case in the Virginia reports. It is the case of *Johnson* v. *Mason*, 1 Wash. 4. This case is also reported in 4 Call. 367, where according to the syllabus it was decided that "a motion to the same judge, who tried the cause, for a new trial upon the ground of a misdirection to the jury and an exception to the refusal of it instead of an exception to his original opinion is improper. But still, if the whole matter is stated in the record, the court of error will pass over the form and look to the substance of the direction." The instructions complained of were not excepted to when given but appeared with the whole evidence in the bill of exceptions taken to the refusal of a new trial. This case was subsequently in 1830 disapproved by the court of appeals of Virginia in *Guerrant* v. *Tinder*, Gil. 41. The court in that case say: "In the case of *Johnson* v. *Mason*, 1 Wash. 4, it was stated by the president of the court, that a motion for a new trial on the ground of a mis-direction is never made before the same judge but before the appellate court

upon an exception taken in the court below, we are of opinion, that this ground is quite too narrow. The same judge may upon a deliberate motion for a new trial supported by arguments and authority retract a hasty opinion expressed by him in the progress of the trial. That course too would save the expense and delay of appealing to a superior court for the purpose. But as he may not retract his error, an application for a new trial may also be made to the appellate court, and to that end an exception is provided. On the appeal the application is still in effect for a new trial."

It appears thus, that in the early days of Virginia there was a diversity of opinion as to whether, if a new trial was to be asked because of the misdirection of the judge during the trial, the application for such new trial should be made to the court, before whom the case was tried, or to the appellate court. It seems to us now very strange how there could be any controversy on this point. But if we bear in mind that prior to the Code of Virginia of 1849 there was no statute-law stating what court should have jurisdiction to grant new trials, and if we further consider, that prior to the constitution of Virginia of 1851 the jurisdiction of the different courts in Virginia had not been definitely settled either by constitutional provisions or by statute-law, we can understand how judges might then differ as to whether the courts, before whom a case was tried, or the supreme court of appeals had jurisdiction to grant new trials when asked for because of a misdirection of the judge during the trial of a case before a jury. But whatever diversity of opinion may have once existed on this point, there could be no question raised on this point after 1851. For by the Code of 1849, which went into effect July 1, 1850, jurisdiction to grant new trials was for the first time expressly conferred on the trial-court, (Code of Virginia of 1849, ch. 177 sec. 15) and this has ever remained the law both in Virginia and this State. (Code of West Virginia ch. 131, sec. 15.) By the constitution of Virginia of 1851 Art. VI, sec. 11 (Code of Virginia of 1860 p. 53) there was conferred on the supreme court of appeals appellate jurisdiction only except in cases of *habeas corpus, mandamus and prohibition.* Its jurisdiction is specially defined; and this has ever since remained a constitu-

tional provision. (Constitution of West Virginia of 1863, Art VI, sec. 8; Code of West Virginia p. 30; Constitution of West Virginia of 1872 Art. VIII, sec. 3, p. 25 of Acts of 1872–3 and first amendment to this constitution Art. VIII, sec. 3, Acts of 1883 p. 189.) It seems clear therefore, that since 1851 there can be no question either in this State or in the State of Virginia, that the supreme court of appeals has no jurisdiction to grant a new trial in a case tried in the circuit court for any cause whatever, but that such new trial must be asked of the circuit court, and if it refuse to grant it, then its judgment in this matter may be reviewed by the supreme court of appeals, who may grant it on the reversal of the judgment of the circuit court, exercising its appellate power in so doing. And it is well said in *Guerrant* v. *Tinder* Gill 41, where this is done, the appeal is in effect an application for a new trial. This clearly can now be exercised by this Court only on a review of a decision of the circuit court refusing to grant such new trial, that is, after a motion for such new trial had been made to the circuit court and refused.

Johnson President, in *The State* v. *Frew & Hart*, 24 W. Va. 460–464 reviewed the various constitutions of Virginia and the statute-law of that State prior to 1850 in relation to the jurisdiction of the different courts; and if this review is read, we will better understand how from the indefiniteness of the law a controversy might arise, as to whether a circuit court or the supreme court of appeals should be applied to for a new trial, when the application was based on a misdirection to the jury by the circuit judge. While this question, as we have seen, was necessarily put to rest by statute-law and constitutional law, April 1851, it was in fact settled in the same way long prior to 1851 by the decisions of the courts. Judge Pendleton in the case of *Power* v. *Finnies*, 4 Call 415 decided in 1797 says in the conclusion of his opinion: "We had contemplated granting a new trial, but being an appellate court, and no motion for a new trial having been made in the district court, we could not do it." In the case of *Humphreys* v. *West*, 3 Ran. 518 declared in 1825, Judge Coalter said: "The granting of a new trial however rests with the court before whom the trial was had, and that too upon a

motion to that court, for a new trial: there being no case in which that court is bound *ex mero motu*, and without motion, to grant a new trial, and subject the defendant without his consent to greater damages. The appellate court can not grant such new trial; for that would be to reverse the judgment of an inferior court on a motion for a new trial here, which was not made to that court, and of course on a matter in which that court commits no error."

It seems to me therefore, that point 3 of the syllabus in *State* v. *Phares*, 24 W. Va. 657 is sustained by the weight of the Virginia authorities. That point is: "In a case tried by a jury, no matter how many exceptions are taken to rulings of the court made during the trial, unless a motion is made before the trial-court to set aside the verdict, and that motion is overruled, all such errors saved will by the appellate court be deemed to have been waived." The kindred decision by this Court made in *Core* v. *Marple*, 24 W. Va. 354 is also sustained by the weight of the Virginia decisions. The decision in that case was: "When an instruction is given to the jury without objection at the time, and no exception is taken thereto, though a motion be made for a new trial, on the ground that this instruction was erroneous and prejudicial to the party, against whom the verdict was rendered, and this motion was overruled and excepted to properly, this Court will not review this instruction or reverse the case, because it is erroneous."

In the case of *Washington & New Orleans Telegraph Co.* v. *Hobson & Son*, 15 Grat. 122, point 3 of syllabus, it was decided: "It must appear from the record, that a point decided by the court has been saved before the jury retires; though the exception may be prepared, and may be signed by the judge either during the trial or after it is ordered during the same term. If this appear from the whole record, it is sufficient, though it is not expressly stated in the bill of exceptions; but if it does not appear from the record, the appellate court cannot review the judgment of the court below upon that point." A motion for a new trial was made in that case and overruled, and exceptions thereto regularly taken. In the case of *Martz* v. *Martz*, 25 Grat. 368, there was a question of controversy, whether on the admission of certain

testimony to go to the jury, to which the appellants objected, they gave any notice, that they excepted to the action of the court in admitting such testimony, at the time it was admitted; and upon this, it would appear, the court deemed, that the propriety or impropriety of their considering whether this testimony ought to have been admitted, would depend. They concluded that the record showed that the exception was made, when the testimony was admitted; and therefore they considered whether such testimony was or was not admissible.

In the case of *Peery* v. *Peery*, 26 Grat. 320, the first point of the syllabus is: "Though the plaintiff moves the court, before the jury returns to consider of their verdict to exclude certain evidence which had been given on the trial, which the court refused to do. It notice of a proper purpose to except is not given till the jury come into court with their verdict the exception is too late." A motion was in this case made for a new trial, which the court overruled, and a bill of exceptions was properly taken. The court, though it thought the court below ought to have excluded this evidence, yet as its admission was not excepted to at the proper time, in reviewing the case refused to consider or give any weight to the fact, that the court had improperly admitted this testimony but regarded any objection to its being received as waived by the plaintiff's not excepting to it in time.

The case of *Winston* v. *Giles*, 27 Grat. 530, is not upon the question under discussion, but in it Judge Moncure says: "Formally and regularly a bill of exceptions purports to be tendered and signed when or immediately after the opinion excepted to is given; and certainly if convenient, the facts could then be set out more accurately and with less difficulty than at any other time. It is admitted in all cases and everywhere, that at least the exception must be taken at the time so as to give notice of it to the adverse party; and some of the cases require the substance of the exception should be stated in writing at the time."

In the case of *Page* v. *Clopton*, 30 Grat. 415, the second point of the syllabus is: "The usual practice is to give notice of the exception at the time the decision is made, and reserve liberty to draw up and present the bill for settlement and

signing, either during the trial or after the trial, and during the time, as may be allowed by the court, but it must be signed during the term at which final judgment is rendered; and it will be disregarded in the appellate court, if signed after the end of such time, although signed pursuant to a previous order allowing it, unless perhaps such order be made by consent of parties."

On the other hand it was decided in *Bull* v. *The Commonwealth*, 14 Grat. 614, point 6 of the syllabus: "If a party be dissatisfied with an instruction, he ought to state his objection at the time. If no objection is stated to an instruction at the time it is given, and no exception taken or point saved; but objection made for the first time, after verdict, in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered according to the law and the evidence, will not set it aside on account of that objection." The opinion of the court, in which the law was thus laid down, was delivered by Judge Moncure. In that case the court refused to set aside the verdict for misdirection by the judge at the trial. The inference from the law as thus stated is, that if the instructions given were erroneous, though not objected to when given, yet if they were calculated to mislead the jury, it would be the duty of the court on a motion for a new trial to set aside the verdict and grant a new trial; and the appellate court would supervise the action of the court below in that respect; and it was accordingly so held in *Stevenson* v. *Wallace*, 27 Grat. 78, point 13 of the syllabus.

In the *Danville Bank* v. *Waddell's Adm'r*, 31 Grat., Burks Judge, on page 477 says: "In jury-trials I have always understood the rule to be that if a party objects to a ruling of the presiding judge during the progress of a trial, either in admitting or excluding evidence, or giving or refusing instructions or otherwise, and intends to except to such ruling he must make known such intention at the time of the ruling or at least before a verdict, and if the bill of exception can not be drawn at once, liberty should be reserved to do so during the time, and if he neglect to prefer exception till after the verdict, he will not then be allowed to do so. One of the

reasons for the rule requiring this promptness in taking the exceptions and giving notice thereof, is that the exceptions taken and made known for the first time at a subsequent period in the trial might effect very injuriously the rights of the opposing party: for if he have reasonable notice of the exception, he may perhaps have it in his power at the time or during the trial to obviate or counteract it, and it would be unjust to allow his adversary to insist on the exception, and have the benefit of it, after, by his own negligence, or it may be by his contrivance, he has made it impossible to meet it." He refers then to the cases above cited to show, that this is the rule of practice established in Virginia and proceeds: "Whether this general rule which seems to be established by the decisions referred to is to be regarded as modified by the cases of *Bull* v. *Commonwealth*, 141 Grat. 613 and *Stevenson* v. *Wallace*, 27 Grat. 77 in its application to instructions, to which objection is made for the first time by way of motion to set aside the verdict of the jury, it is not necessary to determine in the present case."

In my judgment it is impossible to regard the rule laid down or deducible from the decisions in *Bull* v. *The Commonwealth*, 141 Grat. 613 and *Stevenson* v. *Wallace*, 27 Grat. 77 as modifications of the general rule above stated deducible from the current of Virginia cases; but those two cases must be regarded as in irreconcilable conflict with this general rule, For of what possible value is a rule requiring a party to save an exception at the time an instruction is given the jury, to which he objects, in order to enable his opponent by withdrawing the instruction or getting the court to modify it so as to make it clearly unobjectionable or in some other way meet or obviate the objection, if the party can obtain the full benefit of his objection to an instruction offered by his opponent without making any sort of objection thereto by incorporating his objection in a bill of exceptions to the overruling of his motion for a new trial or by relying on and making his objection to the instruction for the first time, when he moves for a new trial? Is it not obvious, that the general rule would be utterly worthless, if it was thus modified? For who would ever give notice, that he excepted to the admission or exclusion of evidence by the court or to the giving or refus-

ing of iustructions at the time of these rulings by the court, if he could have the full benefit of his exception without giving any notice of it or even of any objection to the action of the court, till after he had taken his chance of getting a verdict from the jury? This supposed modification of the general rule would in effect operate as a total abolition of it; and hence I regard these two decisions in 14 Grat: and 27 Grat. as irreconcilably in conflict with the general current of authorities in Virginia.

In addition to the authorities, which I have cited, I may refer to *Lamberts* v. *Cooper*, 29 Grat. 61, which was the trial of an issue out of chancery, where Judge Staples says: "The ruling of the court is one of the errors assigned in the petition for the appeal. It does not appear however that the appellants excepted to the opinion of the court, permitting the witness to testify, or intimate a purpose or desire to save the point. The fact that objection was made at all to the witness only appears from the certificate of the evidence given by the judge upon the overruling of the motion for a new trial. Conceding that the court erred in its decision can the appellants here rely upon it as a ground for reversal?" He concludes that they can not. The other judges concurred in his views and it was so decided. See point 1 of syllabus of the case p. 61.

My conclusion therefore is, that the decision of this Court in *Core* v. *Marple*, 24 W. Va., 354, is sustained both by reason and by the weight of testimony. In this State in *Stansburry* v. *Miller*, 10 W. Va. 127, Judge Johnson cites approvingly, *Humphrey's admr.* v. *West's admr.* 3 Rand 516, above quoted and says: "A new trial can only be had upon motion, as a court is not bound *ex moro motu* to grant a new trial;" and in *Riddle* v. *Core*, 21 W. Va., p. 530 point 4 of syllabus, this Court decided, that "a new trial in a case where there was a demurrer to the evidence as in all other cases can only be had, because the verdict is excepted, upon motion. The appellate court cannot grant a new trial without such moiton in the inferior court." The reasons given for this decision are those given in *Humphrey* v. *West*, which have been given hereinbefore. The two cases were just alike, so far as this question is concerned. It *State* v. *Phares*, 24

W. Va., 657, 658, this Court decided that: "In a case tried by a jury no matter how many exceptions are taken to rulings of the court made during the trial, unless a motion is made before the trial-court to set aside the verdict, and that motion is overruled, all such errors will by the appellate court be deemed to have been waived." The court also decided: "A new trial for errors committed during the trial can only be had after motion made in the trial-court and overruled; as this Court will not *ex moro motu* grant a new trial in case no such motion was made in the court below." The reasons for these conclusions are given on pages 661 and 662. In addition to the reasons, which have been assigned for these conclusions, I would add, that if either party were allowed to have the rulings of the court below, which had been properly excepted to and a bill of exceptions taken at the proper time, reviewed without his making a motion for a new trial and its being overruled, he never would make such motion, when his only ground for it was these erroneous rulings against him during the trial; as, if he failed to make the motion, the appellate court would have to presume, that such rulings were prejudicial to him, but if he be required to make such motion before he can avail himself of such rulings against him during the trial, he will afford his opponent an opportunity of having all the evidence spread upon the records, and when this is done, the appellate court may see, that these rulings at the trial were not really prejudicial to him, and in that case, though the rulings were against him, and he properly excepted to them and made them a part of the record, still the appellate court will not reverse the case, though the rulings were erroneous, the presumption that they were prejudicial to him having been rebutted by the evidence in the case when all certified. (*Gerst* v. *Jones*, 32 Grat. 519, point 7 of syllabus; *Kincheloe* v. *Tracewells*, 11 Grat. 587, 609; *Danville Bank* v. *Waddell*, 27 Grat. 448; *Binns* v. *Waddell*, 32 Grat. 588.

These views are sustained by this Court in *Sammons* v. *Hawvers*, 25 W. Va. 678, where it was held, that, if the court below refuse to a party entitled to it a right to open and conclude the case, and he excepts thereto, the error can not be reviewed, unless a motion for a new trial is made and over-

ruled, and the overruling of such motion objected to—and if he does not take a bill of exceptions and set out the facts proven the other side can then have the facts certified in the bill of exceptions so as to show that his opponent was not injured by the refusal of the court to give him the opening and closing of the case.

My conclusion therefore is, if errors or supposed errors of any sort are committed by a court in its rulings during the trial of a case by a jury, the appellate court can not review these rulings of the court, unless two conditions concur: First, these rulings must have been objected to when made and a bill of exceptions taken or the point then saved, and the bill of exceptions taken during the term; and secondly, a new trial must also have been asked and overruled and objected to, and this noted on the record.

As in this case the plaintiff in error did not move the court below for a new trial, the rulings of the court below during the trial, though excepted to at the time they were made, cannot be reviewed by this Court. And the only error assigned by the plaintiff in error in his petition being errors in these rulings at the trial, and an inspection of the record showing that, if these rulings are not considered, there is no error in the case, this Court must affirm the judgment of the court below rendered December 4, 1882, and the defendant in error must recover of the plaintiffs in error his costs in this Court expended and $30.00 damages.

AFFIRMED.

WHEELING.

CHAPMAN *v.* PITTSBURG AND STEUBENVILLE R. R. CO. *et al.*

(*Suit No.* 3.)

Submitted September 8, 1884.—Decided, April 22, 1885.

1. Under the Act of Congress, March 3, 1875, it is too late to make an application to remove a case from the State to the Federal court, several terms after an answer has been filed and excepted to, and the exceptions not passed upon by the court, when the exceptions might have been passed upon, and the case heard at the time such answer was filed. (p. 306.)

2. Where exceptions to a part of an answer are sustained, and the defendant does not ask leave to amend his answer, it is not error to proceed to hear the case on the bill and so much of the answer, as is not excepted to. (p. 307.)

3. Where an answer sets up a claim to the attached property, which with the accompanying exhibits clearly shows, that, at the time the attachment was levied, the defendant had no claim to such property, an exception to so much of the answer, as attempts to set up such defence, is properly sustained. (p. 308.)

4. Where real estate conveyed to a foreign railroad company is attached in this State for the debts of said company, and a defendant claims the property under deed, ordered to be made under proceedings in a foreign court to foreclose a mortgage on the "railroad," and the pleadings in said cause do not assert that the mortgage covers the said property in this State, but the court without passing on that question orders the trustee to sell "all the right, title and interest of the railroad in West Virginia, which passed under said mortgage," and a deed was ordered to be made for such interest, the courts of this State without reference to any conflict of jurisdiction are left free to decide whether any thing passed under said mortgage. (p. 309.)

5. When a mortgage was executed by a Pennsylvania railroad company authorized under its charter to build a road "from near Pittsburg, Pennsylvania, in the direction of Steubenville, Ohio, to the Pennsylvania State line," and the said mortgage grants the whole of their 'railroad ;' and other property "situated between and at the terminus of their railway at the city of Pittsburg and the boundary line of the State of Virginia in the counties of Alleghany and Washington in the State of Pennsylvania," it conveyed no property whatever in the State of Virginia. (p. 310.)

6. The attaching creditor in this State, who bid upon property at the sale under such mortgage in the State of Pennsylvania, is not estopped to insist upon his attachment-lien on the property in this State. (p. 310.)

7. Under sec. 11 of ch. 151 of the Code of 1860 a foreign attachment suit in equity is brought, the affidavit is in form, except it does not state "the nature of the plaintiff's claim" as required by the amendment of 1867 to the first section of the chapter; a few months afterwards, but before any other rights had attached to the subject, an unexceptionable affidavit was filed, but there was no other order of attachment issued, and no other levy made. HELD :

   The lien attached to the land as against everybody at least from the filing of the second affidavit. (p. 322.)

8. Because *pendente lite* the defendant railroad company has taken possession of the strip of land attached, on which was a road-bed and railroad-track, at the time the attachment was levied, it has no right to insist, that a section of a railroad can not be sold. It takes the property if at all *cum onere*. (p. 323.)

The facts of the case appear in the opinion of the Court.

D. Lamb and *W. P. Hubbard* for appellant.

Ewing, Melvin & Riley for appellee.

JOHNSON, PRESIDENT:

This cause No. 3, with Nos. 1 and 2, which were considered and a decree rendered therein on February 22, 1877, were before this Court and the decree affirmed. (18 W. Va. 184.) A statement of the causes may be there found. On the same day that said decree was rendered the attachments issued in Nos. 1 and 2 were passed upon, and the attached property ordered to be sold; but the legal title was not before the Court in this cause, (No. 3) and the attachment therein was not passed upon by the court below for that reason, and this cause was therefore remanded to rules to bring the legal title before the court, before an order could be made to sell the attached property. The record shows, that in the cause the defendant, the Pittsburg Cincinnati and St. Louis Railway Company, filed its answer on September 19, 1877, and on February 4, 1878, the said company by leave of the court withdrew its answer theretofore offered and filed its answer in suit No. 3, in lieu of the said answer; and the plaintiff took time to except or reply thereto.

The said answer contested the validity of the attachment among other reasons, on the ground that the affidavit filed was fatally defective. It denies that the Pittsburg and Steubenville Railroad Company was indebted to the plaintiff. It avers, that the said last named company mortgaged their railroad and other property on October 10, 1856, in trust to Thomas McElrath to secure the first mortgage bonds thereon amounting to a large sum of money, and about the same time executed a second mortgage on said railroad, &c. to secure second mortgage bonds; that said deeds were recorded in

Hancock county on August 31, 1867; that the trustees in said mortgages were purchasers for value without notice of the attachment; that no notice of *lis pendens* was left with the recorder of Hancock county until September 25, 1867; that suit was brought in the supreme court of Pennsylvania by Thomas McElrath *et al* to foreclose said mortgage; and that a decree of foreclosure was entered, and the property ordered to be sold, which was done, and the sale confirmed, and a deed for the property including that portion in West Virginia was ordered to be made to the purchaser, Wm. J. Howard. The answer further avers, that the plaintiff, Chapman, had notice of said sale and was one of the bidders thereat and is therefore bound and concluded by the decrees entered in said suit; that in 1868 the several railroad companies were consolidated into one, which consolidation by act of the Legislature of West Virginia was ratified and confirmed; that on March 3, 1876 the said William J. Howard and wife by deed conveyed to said respondent "all the estate, right, title and interest whatsoever of in and to the railroad property, rights and franchises purchased by the said Wm. J. Howard as aforesaid, which passed to him under and by virtue of the decree of said supreme court and of the said sale and the said deed from Thomas McElrath dated December 7, 1867." The defendant therefore insists, that, at the time said attachment issued on same, the Pittsburg and Steubensville Railroad Company did not own or purchase any property in the said county of Hancock, West Virginia described in said attachment or bill, but that defendant has perfect title thereto.

The answer files as exhibits the proceedings in the Pennsylvania record, together with the several conveyances to show its title to the property. The granting clause in the deed to McElrath, trustee, describes the property conveyed as follows: "The whole of the railroad together with the lands, depots, depot-grounds and buildings situated between and at the terminus of their railway at the city of Pittsburg and the boundary line of the State of Virginia in the counties of Allegheny and Washington, in the State of Pennsylvania, and also all the property and franchises, and all the tolls, issues, income and profits of the said company hereafter derived to them from the use of or travel on their said road or any part

thereof; and also all the cars, engines, locomotives, tenders, horses, or other things, used in the business and management of said railroad." The description of the property in the second mortgage is the same.

The nineteenth point in the bill for foreclosure, describes the "railroad" as follows: "That the 'railroad' intended to be built by said company, referred to in the said mortgage, extends from the city of Pittsburg to the Virginia State line, a distance of about thirty-four miles." The nineteenth point of the answer of the Pittsburg and Steubenville Railroad Company is as follows: "That the road of the Pittsburg and Steubenville Railroad Company extends from the Monongahela river opposite the city of Pittsburg to the Virginia State line in the direction of Steubenville, and the same is now substantially finished."

The master in his report, says: "The Pittsburg and Steubenville Railroad Company was duly incorporated by the legislature of this State by an act approved March 24, 1849. This act authorizes the company to 'construct a railroad, commencing on the Monongahela river near Pittsburg and running in the direction of Steubenville on the Ohio river to a point on the Virginia State line.' The distance between these points is thirty-four miles, and from the State line to Steubenville is eight miles."

To the report of the master there was one exception filed by counsel for complainants which was: "Because the report and decree (drawn by the master) do not provide for the sale of the right, title and interest of the Pittsburg and Steubenville Railroad situate in the State of West Virginia as a part of the mortgaged premises." In passing upon this exception Judge Agnew said:

"The plaintiffs except to the report of the master, on the ground that he omitted to incorporate into the form of a decree submitted by him a provision ordering the trustee in the mortgage to sell the estate and title of the Steubenville Railroad Company in that portion of the railroad situate in the State of West Virginia. Without deciding what estate would pass by the trustees sale under the mortgage, we are of opinion, that we can by our decree operating upon the trustee himself authorize and compel him to sell and convey whatever inter-

est of the Railroad Company will pass under the terms of the mortgage. As it is the desire of all the parties expressed in the agreement, that in the event of a decree of sale being made the sale should pass all possible titles and interest of the railroad company in the whole extent of the road, we will direct that the master's report be so amended. Let a decree be drawn and entered in this case in the form reported by the master * * and adding to the fourth section the following words: 'And that such order shall contain authority and direction to the said Thomas McElrath, the trustee, to sell and convey, all the estate, right, title and interest claimed and demanded of the said, The Pittsburg and Steubenville Railroad Company, of and in that portion of the railroad operated and run by the said company, through their lessees, in the State of West Virginia, between the boundary line of the State of Pennsylvania at the easterly end, and the Ohio river at the westerly end, which passed to him under and by force of the terms and interest of the said mortgage mentioned in the first section of this decree.'"

The decree entered May 29, 1867, provides: "That in default of such payment within the period aforesaid, the railroad, property, estate, premises, appurtenances and franchises conveyed by said mortgage to the said Thomas McElrath named therein, including all the estate, right, title, interest, claim and demand, of the said Pittsburgh and Steubenville Railroad Company, of and in that portion of the railroad operated and run by said Company through their lessees in the State of West Virginia, between the boundary line of the state of Pennsylvania at the easterly end, and the river Ohio, at the westerly end, which passed to him under and by force of the terms and extent of said mortgage be exposed to sale, &c."

The sale was made and reported. In his report the trustee says: "I did expose the aforesaid premises at sale by public vendue or outcry, when and where, W. J. Howard, Esq., became the purchaser thereof, for the price of the sum of $1.960.000.00 (one million, nine hundred and sixty thousand dollars), he being the highest and best bidder, and that the highest and best price bidden for the same."

On December 7, 1867, the court ordered the said McElrath forthwith to execute a deed for said property. One of the exhibits filed with the answer is a copy of a deed from Thomas Seabrook trustee to the Pittsburg, Cincinnati and St. Louis Railway Company, executed on September 9, 1874, and recorded in Hancock county on September 4, 1877, and in Brooke county on September 19, 1874. This deed recites the proceedings in the Pennsylvania court, the sale, &c., and at the request of the Pittsburg, Cincinnati and St. Louis Railway Company conveys the several strips of land in Brooke and Hancock counties to said P. C. & St. L. R'y Co. The deed from Howard to said Company was dated March 3, 1876, admitted to record in Brooke county September 5, 1877, and in Hancock on September 4, 1877.

The exceptions to the answer of the defendant, The Pittsburgh, Cincinnati and St. Louis Railway Company, made in March, 1878, in substance are as follows: First.—All that portion of the answer which sets up a claim of title to the property through the mortgage, the sale thereunder, the record of the supreme court of Pennsylvania, the deed made by the trustee by order of said court to W. J. Howard, the act of the legislature of West Virginia of July 23, 1878, and the deed from Howard and wife to said defendant shows no title in said defendant and is impertinent. Second.—So much of the answer as alleges the appearance of the plaintiff before the master in the Pennsylvania suit, the action of the master and court affecting his claim or interest and his bidding at said sale under the decree is impertinent and raises no defence to this suit. Third.—The charges and averments relating to the merits of the claims of the plaintiffs are not responsive to any charge in the bill affecting the interest of said defendant. Fourth.—The averment, that the trustees in the first and second mortgages were purchasers without notice, is impertinent. The cause was heard on March 22, 1883, upon the decree before entered, &c., the answer of the P. C. & St. L. R'y. Co., the exceptions to said cause filed at March rules, 1878, &c. The exceptions to the answers were sustained, and the cause was heard on the amended bill and so much of said answer as was not affected by said exceptions, and the motion to quash the attachment, which motion was overruled. The legal title

being before the court, the court proceeded to declare the attachment a lien upon the land levied on therein, to-wit: "The strip of one hundred feet in width, situate in Hancock county, near Harmon's creek, upon which is constructed a railroad-bed and railroad-track," &c., for the sum of $237,-869.71, with interest, &c., and ordered the sheriff of the county to sell the same. The court proceeded further: "And it further appearing to the court that the real estate herein directed to be sold is contiguous to the land directed to be sold by decree of February 22, 1877, (the decree affirmed by this Court,) and that both taken together form a continuous strip of uniform width from the Pennsylvania State line to the Ohio river within the said counties of Brooke and Hancock, the sheriff is directed to make the sale, herein provided for at the same time and place of the sale directed by the said decree of February 22, 1877."

The decree further shows that after the exceptions to the answer had been entered and the motion to quash the attachment overruled, the defendant, the Pittsburg and Steubenville Railroad Company moved to quash and vacate the attachment and levy, which motion the court overruled, and after the decree upon the exceptions to the answer of the P. C. & St. L. R'y Co. had been announced, and its motion to quash the attachment overruled, and after the defendant had objected to the first hearing of the cause, and before the entry of a decree, the said company filed its petition accompanied by a proper bond, asking the removal of the cause to the circuit court of the United States for the district of West Virginia, upon consideration whereof the prayer of the petitioner was rejected. From this decree upon the separate petitions of the Pittsburg and Steubenville Railroad Co. and the Pittsburg, Cincinnati and St. Louis Railway Company an appeal with *supersedeas* was granted.

Did the court err in refusing to enter an order, on the petition of the P. C. & St. L. R'y Co., removing the cause to the circuit court of the United States? The removal was asked under the Act of Congress passed in 1875. We held in the case of *White* v. *Holt, Judge, et al*, 20 W. Va. 792, that under the Act of Congress of March 3, 1875, no case pending in a State court can be removed to a Federal court, un-

less the application to remove is made at or before the term, at which the case could be first tried, and before the trial; and that, when at the first term, at which there could have been a trial, the defendant appeared and demurred to the declaration, and the demurrer was not then considered, but the case was continued to the next term, at which the defendant filed his petition and bond, asking for a removal of the case, the application was made too late, and the court properly refused to enter an order removing the case. Here the defendant filed its answer in 1878. Exceptions to it were filed, which were not decided. The cause afterwards was taken to the Court of Appeals being consolidated with two other causes, and several terms passed, after it was remanded, and at the same term, at which the exceptions were acted on, the petition for removal was filed. The application was too late, and the court properly refused for this reason alone to enter an order of removal. (*Cable* v. *Ellis*, 110 U. S. 289: *Lynch* v. *Andrews*, 25 W. Va. 751.)

It is also assigned as error, that no issue was made up, the cause not having been set for hearing, the court proceeded to hear the cause on bill and answer against the objection of defendant, and without an opportunity given the defendant to amend its answer. It is a sufficient answer to this assignment, that the defendant did not ask leave to amend its answer, and unless it wished to amend, there was no reason why the cause should not then be heard on bill and answer and if there was no replication to the answer, certainly the defendant could not complain of that.

But it is further objected, that although there was no replication to that part of the answer not excepted to, the court proceeded to find all matters in favor of the plaintiff. These matters here referred to except the objection to the attachment, which we will consider, related to the denial of any indebtedness by the Pittsburg and Steubenville Railroad Company to the plaintiff, which was contested by the said company in its answer and found against it on the proof, and a decree rendered for the indebtedness, which decree was affirmed by this Court. All the title, which the said defendant asserts to the property, it claims through and under the Pittsburg and Steubenville Railroad Company and acquired

the same, if any, after the institution of this suit and levy of attachment. It was therefore a *pendente lite* purchaser and certainly could not now come in and deny the indebtedness of the Pittsburg and Steubenville Railroad Company to the plaintiff. If such a claim could be sustained there could be no end to litigation.

But the appellant insists that the court erred in sustaining the exceptions to the answer.

The first exception is, that all the averments of the answer relating to the first and second mortgages of the Pittsburg and Steubenville Railroad Company, the Pennsylvania suit, the consolidation of the three railroad companies, and the conveyance by McElrath, trustee, to Howard and from Howard to the P. C. & St. L. R'y. Co. were impertinent. This exception involves all the right, title and interest of the said defendant to the attached property. If it had such title as it claimed, then the property having been sold under a mortgage made in 1856 by the Pittsburg and Steubenville Railroad Company, if it was recorded in time in West Virginia, would entirely destroy the efficacy of the attachment, and the plaintiff could not enforce the lien. This then raised a vital question in the cause; and if the answer showed on its face, that the property had been so sold and conveyed, then it was error to sustain the said exception; or if the property had not been properly sold under a decree of the Pennsylvania court, yet the mortgages would constitute prior liens on the property, and for that reason it would have been error to sell to pay the plaintiff's debt without ascertaining these liens and their priorities.

It is insisted that a mortgage of a "railroad" possesses not only the whole road, but the lands belonging to it and essential to the enjoyment of its franchise, whenever a road is thus conveyed without specifying the limits of the road. This is true. (*Railroad Co.* v. *Larimer*, 47 Pa. 465; *Wilkins* v. *Canal Co.*, 4 N. J. Eq. 379; *Myer* v. *Johnston*, 53 Ala. 237; *Miller* v. *Railroad Co.*, 36 Vt. 452; *Sheets* v. *Selden*, 2 Wall. 177; *Dinsmore* v. *Railroad Co.*, 12 Wis. 649.) It is also argued that equity could compel a party within the jurisdiction of the court, who had the legal title to land in a foreign jurisdiction, to convey the land to another party before the court who

was entitled to such conveyance. This proposition seems now to be settled law. (*Penn* v. *Lord Baltimore*, 2 L. C. in Eq. 1823; *Dickinson* v. *Humes' Adm'r*, 8 Grat. 411; *Massie* v. *Watts*, 6 Cr. 148; *Williams* v. *Fitzhugh*, 37 N. Y. 444; *Gardner* v. *Ogden*, 22 N. Y. 327.) In 2 L. C. in Eq. 1832, it is said: "The result of the cases as a whole would seem to be, that as the right of real property is essentially local and can only be enforced at law by a recourse to the local tribunals, equity will follow the law and refuse to assume a power which might further the purposes of justice in particular instances, but would ultimately disturb the comity which ought to exist between the courts of different nations, by bringing the decisions of foreign tribunals into conflict with those of the *locus rei sitæ*. (*The Northern Ind. R. R. Co.* v. *The Michigan Central R. R. Co.*, 15 How. 233; *Watts* v. *Waddle*, 6 Pet. 389, 400; Sto. Eq. Jur. § 774; Sto. on Con. of Laws, §§ 463, 543.) But rights growing out of trust or contract, or founded upon a fraudulent violation of the principles of equity, as between man and man, are purely personal, and will consequently be upheld and enforced both by law and equity whenever jurisdiction has been acquired over the parties, without regard to the nature or situation of the property in which the controversy has its origin, and even when the relief sought consists in a decree for the conveyance of land which lies beyond the control of the court, and can only be reached through the exercise of its power over the person."

But the first question for us to determine is: Did McElrath have any title to the land in West Virginia? The supreme court of Pennsylvania, as we have seen by the statement of the case, refused to pass upon that question but decreed, that he should sell and convey all the title he had by virtue of said mortgage, without saying what it was. It is for us then without considering any legal questions on the conflict of jurisdiction to determine what that right, title and interest was, if any. As we have seen, the language of the mortgage is: "The whole of their railroad, together with the lands, depots, depot-grounds and buildings situated thereon between and at the termini of their railways at the city of Pittsburg and the boundary line of the State of West Virginia in the counties of Allegheny and Washington in the

State of Pennsylvania," &c. It is argued that in construing an instrument of writing we are to ascertain the position occupied by the parties at the time it was made, and interpret the language they have used in the light afforded by the circumstances which then surrounded them. This is a correct rule, when there is any ambiguity in the language used. It seems to me there is none here. "Their railroad" is by the very terms of the grant limited to the *termini*, both of which are within the State of Pennsylvania. That is all of the road, if it was longer, that is included in this mortgage. The mortgage of a railroad passes its franchises, its right to do business and whatever right the P. C. &. St. L. R'y Co. has to do business in this State now. The Pittsburgh and Steubenville Railroad Company never did have a right to run a railroad through the State of West Virginia and on August 1, 1856, did not pretend to mortgage what it did not have. It had no "railroad" in West Virginia to mortgage. The pleadings in the Pennsylvania suit as well as the master's report all show, that the "railroad" only extended to, not beyond, the Pennsylvania line. Therefore, none of the attached land passed to McElrath in the deed of August 1, 1856, nor in the second mortgage deed, nor did any of said land pass by the deed from McElrath to Howard nor from Howard to the P. C. & St. L. R'y Co. The court therefore did not err in sustaining the first exception to the answer.

The second exception was, that the averments respecting plaintiffs appearing before the master in the Pennsylvania suit and his bidding at the sale were irrevelant. This aver- in the answer was designed to plead that the plaintiff was in equity estopped to deny the title of the defendant. As the attached lands were not included in the mortgage, of course there is here no estoppal on the plaintiff, and said exception was properly sustained.

The third exception was that the denial of the plaintiff's claim against the Pittsburg and Steubenville Railroad was not relevant to any issue then before the court and was impertinent, as that matter had been passed upon and adjudicated between the said creditor and debtor. This exception was properly sustained, because the said defendant had no interest in that question, and it had been settled and determined.

The fourth and last exception was the averment, that the trustees in said first and second mortgages were purchasers without notice, was impertinent. The exception was properly sustained, as they were not purchasers of said attached property.

It is insisted that the attachment ought to be quashed, because the statute was not complied with; that the property was not sufficiently described, and that the affidavit was wholly insufficient. This defence is raised in the answer of the Pittsburg, Cincinnati and St. Louis Railway Company, and by the motions made by said company and by the Pittsburg and Steubenville Railroad Company. The bill particularly describes the property which is attached. The order of attachment and endorsement on the subpoena are as follows:

"Proper affidavit having been made the sheriff of Hancock county is hereby directed to attach any estate in the county of Hancock, in the State of West Virginia, belonging to the Pittsburg and Steubenville Railroad Company, and particularly attach a piece or strip of land one hundred feet wide running through the said county of Hancock, near Harmon's creek, and on which is constructed a railroad-track, railroad-bed, and the premises and appurtenances on said land, or a sufficiency thereof to satisfy the plaintiff's claim of $300,000.00 and interest and costs of suit." The return is endorsed on said order as follows: "Levied the above attachment on all the lands, railroad-track, railroad-beds, and the premises and appurtenances belonging to the Pittsburg and Steubenville Railroad Company, in the county of Hancock, in the State of West Virginia, being the property specified in the attachment endorsed hereon, at five o'clock on June 11, 1867." Clearly meaning "being the property specified in the order or attachment, on which this levy is endorsed."

The first affidavit made on said June 11, 1867, by the plaintiff, Chapman, is as follows:

"George Marcus Chapman this — day of June, 1867, personally appeared before me, Jasper Whims, clerk of said court, in my office as said clerk, and made oath before me in my said office, and said the Pittsburg and Steubenville Railroad Company is justly indebted to me in the sum of $300,-

000.00, and that said claim is just, and no part thereof has been paid, and that there is just cause of action therefor, and that the Pittsburg and Steubenville Railroad Company is a foreign corporation," &c.

In September, 1867, a proper paper was filed for an order of publication, in which the objects of the suit is set forth. On November 20, 1867, James Hervy, the agent of the plaintiff, filed an affidavit specifying particularly the nature of the plaintiff's claim, that it was just, that the plaintiff ought to recover, and that the defendant had estate in the said county of Hancock, and described the estate. There was no other endorsement on the subpœna after the affidavit was made. It is insisted that for the defect in the first affidavit the attachment should have been quashed; and that after an affidavit is made and an attachment issued upon it, the affidavit can not be amended unless by authority of statute. In support of this position the following cases are cited. *Pope* v. *Hibernia Insurance Company*, 24 Ohio St. 481; *Mark* v. *Abromson*, 53 Tex. 264; *Hally* v. *Jackson*, 48 Md. 254; *Lillard* v. *Carter*, 7 Heisk. 604; *Watts* v. *Carnes*, 4 Heisk. 534; *Sullivan* v. *Fugate*, 1 Heisk. 22; *Hall* v. *Brazleton*, 40 Ala. 406; *Shields* v. *Dothard*, 59 Ala. 596. I have examined all these cases, and, while they sustain the proposition, none of them were foreign attachments in equity. In *Pope* v. *Insurance Co.* 24 Ohio St. it was held:

"Jurisdiction of a defendant can not be acquired by proceedings in attachment, on the ground of his non-residence in the State, when the petition in the case, and the affidavit for attachment, fail to show that the cause of action, is one arising upon contract, judgment, or decrees, jurisdiction can not be acquired in such case by amendment of the petition and affidavit, showing a cause of action arising upon contract, without the issuance of attachment after the amendment."

But in our State and Virginia in foreign attachments in equity it is not the affidavit that gives the jurisdiction. *O'Brien* v. *Stephens*, 11 Grat. 610 was a foreign attachment in equity, and no affidavit was filed at all, and the defendants appeared and demurred to the bill. The court held, that the nature of the claims asserted, the non-residence of the defend-

ant, and the location of the property gave the court jurisdiction of the subject; the mode and measure of relief, must be governed by the general rules of chancery practice, as modified by the statute. The court further held, that after the defendants appeared, it was competent to render a personal decree against them as they might thereafter resort to an attachment against the property, as the statute authorizes such resort, after the suit is brought. The bill in *O'Brien* v. *Stephens, et al*, was filed under and governed by the Act of 1852, which is the same as the provisions in the Code of 1860.

Moore v. *Holt*, 10 Grat. 284, was decided in 1853, and the cause arose under the Code of 1819. This was a foreign attachment in equity. Lee, Judge, who delivered the opinion of the court, said:

"This is a contest between persons claiming to be creditors of a common debtor and seeking priority out of the proceeds of his effects which have proved inadequate to the satisfaction of all. The suit of the appellee was what is called a 'foreign attachment' commenced by a subpœna sued out on October 12, 1846 with the usual endorsements to attach the effects of the absent debtor in the hands of the home defendants and to restrain the latter from disposing of them until the further order of the court. It was made returnable to the November rules following, and upon the day upon which it issued, it was executed on the defendant Snodgrass who had in his possession a stock of goods and other effects belonging to the debtor, Joseph W. Holt. After the service of this process, that is to say, on and after October 17, 1846, the appellants and other creditors of the said Joseph Holt sued out their second attachments at law, and the same were levied on the same property. * * It is objected on the part of the appellants that the appellee's attachment was issued irregularly and was void, because no such affidavit of the non-residence of the debtor, as is required by the statute, had been made and filed before the *subpœna* with the endorsements of attachment issued. It has never been the practice, so far as I have been able to learn, to file an affidavit of non-residence with the clerk in order to authorize him to issue the *subpœna* and to make such endorsment in the nature of an attachment therein, as the plaintiff's counsel may direct.

According to the long established usage of the State such an endorsement without a previous affidavit serves as a notice to the home-defendant not to part with the effects of the debtor in his hands without leave of the court, and when served upon the home-defendant creates a lien in favor of the creditor, of which neither the absent debtor, nor the garnishee by any act of theirs, nor any third person by any attachment or other process of law subsequently levied could deprive him. This practice has been repeatedly recognized as regular both by the chancery courts and the court of appeals. (*Smith* v. *Jenny*, 4 Hen. & Munf. 440; *McKinn* v. *Fulton*, 6 Call. 106; *Williamson* v. *Bowie*, 6 Munf. 176; *Erskine* v. *Staley*, 12 Leigh. 406.)

"An endorsement, in the nature of an attachment, has not, it is true, been construed to authorize the officer serving it to take the effects out of the hands of the garnishee, or to require him to give security to have them forthcoming; nor does it operate as an injunction, so as to subject a party to the penalty of a contempt for disobedience. If the plaintiff desires such a formal order of the court, as will serve these purposes, he must file the affidavit according to the terms of the act; but for the purpose of a notice to the garnishee, and to secure a lien upon the property, a *subpœna* with an endorsement in the nature of an attachment, comes in place of the formal order of the court, and had indeed superseded it in practice and rendered it unnecessary as early as *Smith* v. *Jenny*, decided in 1809. The act certainly does not require the affidavit to be filed before the *subpœna* can issue; and I am aware of no case, from which any inference can be fairly made to refuse it. The case of *Brown* v. *Pitman*, 12 Leigh 379, referred to by the counsel does not so decide. The court in that case held, that it was error in the court below to proceed to decree against absentees without an affiavit of non-residence or that upon inquiring at their usual places of abode they could not be found. Nothing is intimated of any necessity to file this affidavit before the *subpœna* issues; and it is expressly held, that the answer of a defendant admitting that he was a non-resident would render any affidavit unnecessary.

"The next objection is that the attachment was void for uncertainty, because neither the character nor amount of the

claim, for which the attachment is sued out, is stated in the endorsement on the *subpœna*. The endorsement however is of course to be understood as referring to the bill to be filed, in which the nature and amount of the complainant's demands must be properly exhibted."

The affidavit, of which Judge Lee was speaking, is found in sec. 1, chap. 123 of Code of 1819, which provided: "If in any suit, which hath been or hereafter shall be commenced, for relief in equity in any superior court in chancery or in any other court against any defendant or defendants, who are out of this county, and others with the same having in their hands effects of or otherwise indebted to such absent defendant or defendants, or against any such absent defendant or defendants having land or tenements within the Commonwealth, and the appearance of such absent defendants be not entered, and security given to the satisfaction of the court for performing the decrees, *upon* affidavit that such defendant or defendants were out of the county, or that upon enquiring at his, or her, or their, usual place of abode, he, she or they could not be found, so as to be served with process; in all such cases, such court may make an order, and require surety, it it shall appear necessary, to restrain the defendants in this country, from passing, conveying away, or secreting the debts, by them owing to, or the effects in their hands, of such absent defendant, or defendants, &c."

In *Cirode* v. *Buchanan, adm'r*, 22 Grat. 205 it appeared, that in February, 1867, B. administrator, *de bonis non* of J. filed his bill, in which he sets out a money decree of an Alabama court against S; that S. is a non-resident of the State; that he owns land here which he describes and asked that it may be sold for the payment of his debt; but he did not pray for an attachment, nor was an attachment sued out, nor an endorsement on the process of the object of the suit. In May 1867 there was an affidavit that S. is not an inhabitant of the State, and an order of publication setting out the object of the suit. In July 1868 S. was declared a bankrupt in Tennessee, and his assignee C. makes himself a party to the suit, and claims the bond or its proceeds, it having been sold. It was held, first: The bill stating a good cause for an attachment-suit, the affidavit required by the statute may be made

at any time, before another person obtains a right, and the endorsement on the *subpœna* is not necessary to render his attachment valid. Second: If an endorsement were necessary, the order of publication was in the nature of process, and B. is entitled to the proceeds of the property as against C. the assignee in bankruptcy. Moncure, President, who in 1872 announced the unanimous opinion of the court, said:

"This is an appeal from a decree of the circuit court of Smyth county and involves a question of priority between a foreign attachment creditor and an assignee in bankruptcy of a common debtor in regard to certain real estate of the debtor lying in said county. The question depends on the priority of time when the respective liens or claims of the conflicting claimants attached to the subject. The attachment-creditor claims a lien from the time of filing his bill, to-wit: the 20th day of February, 1867, the assignee in bankruptcy claims a lien from the time of the filing the petition in bankruptcy, to-wit: the 2d day of March, 1868, or at least from the time of the adjudication of bankruptcy to-wit: the 28th of March, 1868. If the claim of the person is well founded it is of course paramount to that of the latter. *Prior in tempore est prior in jure.* The assignee takes the estate of the bankrupt just as the bankrupt held it, subject to all liens and equities when good against the bankrupt at the time he became such. * * There is no contest in this case as to the fact, that the common debtor filed his petition in bankruptcy on the 2d day of March, 1868, and was adjudged a bankrupt on the 28th day of March 1868, nor does it appear that there is any contest as to the fact that the debt claimed by the attaching creditor was due by the common debtor at the time of the institution of the suit and still remains unpaid. Nor as to the facts that the debtor at that time was a non-resident of the State of Virginia, that he owned the real estate on which the attachment lien is claimed, that the said real estate is situated in the said county of Smyth in this State, and that these facts were all averred in the bill, which was filed in this suit on February 20, 1867. All these facts are fully sustained by the pleadings and proofs in the cause. The foreign attachment-creditor had undoubtedly a good cause for a foreign attachment

in chancery at the time of the filing of his bill, and the controversy in this cause seems to be narrowed down to this: Whether he so prepared his bill, and so proceeded upon it, as to make him a foreign attachment-creditor, and give him the benefit of a foreign attachment-lein from the time of the filing of his bill? He had a good cause for a foreign attachment suit in chancery. Has he sufficiently stated it in his bill? And has he done what was necessary to give effect to his attachment lien? If he has not he has certainly been very unfortunate."

The judge then reviews the allegation of the bill, and reaches the conclusion, that although the suit therein is not called an attachment suit, and the bill does not in terms pray that the land may be attached for the payment of the claim, yet the bill contains all the necessary and proper allegations for such a suit, and prays for suitable specific as well as for general relief, which he holds is sufficient in substance, unless the complainant has omitted something in the proceedings in the suit, which the statute requires, to give it affect as an attachment suit, in other words to give it affect as an attachment lien upon the land against the claim of the assignee in bankruptcy arising subsequently thereto. "Has there been any such omissions then?" is the question. If there has, it consists in the omissions of such an affidavit, as the statute requires to be made in such cases, or in the omission of the endorsement on the subpœna describing the real estate intended to be attached. He then discusses the affidavit required by the Code of 1819, and that required by the Code of 1849, and the amendment of 1852, under which the case he was considering arose. Speaking of the affidavit of non-residence filed in the suit, he says:

"This affidavit would have been a full compliance with the requisition of that act, (1819). But the Code of 1849, ch. 151, made a material change of the attachment law; and sec. 11, which relates to attachments in equity, provides that 'there may be an affidavit according to the nature of the case conforming, as near as its nature will admit, to what is specified in previous sections.' Sec. 1 of the same is the section here chiefly referred to, and provides that 'when any suit is instituted for any debt, or for damages for breach of any

contract an affidavit stating the amount and justice of the claim that there is just cause of action therefor, that the defendants or one of the defendants, is not a resident of this State, and that affiant believes he has estate or debts due him in the county or corporation, in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated.' An affidavit, which corresponds substantially with that described in sec. 1, seems to be such an one as is contemplated by sec. 11, and is more comprehensive than the affidavit required by the Act of 1819, which was only as to the non-residence of the debtor, or that upon inquiry at his usual place of abode, he could not be found so as to be served with process. But in construing the attachment-law of 1849, we must bear in mind one of the chief purposes, which the Legislature had in view, to-wit: to provide a substitute for the right, which previously existed, to hold a defendant to bail, and we must look at the whole act together. The plan of the Legislature was to apply a legal remedy to legal demands; and equitable remedies to equitable demands; so as to give a remedy by attachment in equity only in those cases, where the demand was equitable, and where, if all the defendants resided in the State, the suit would have to be brought in equity. According to this plan, the attachment was a mere collateral proceeding, incident to the main action or suit, which was the same in form, as if no attachment was incident to or connected with it. It did not appear from the pleadings in the action or suit that any of the defendants were non-residents, or whether they had any, or if any, what estate within the jurisdiction of the court. These pleadings merely showed that the plaintiff had a good cause of action or suit, supposing all the defendants to be residents of the State. Therefore it was fit and proper, when the plaintiff wished to have the benefit of the attachment to secure the amount of what he might recover in the action or suit, that he should be required as a foundation of the attachment to make such an affidavit as was required by the Code of 1849. The law had previously been different. The only remedy, which then existed against a non-resident debtor

owning estate in this Commonwealth, was a foreign attachment in chancery, whether the debt was a legal or equitable debt. When the debt was a legal debt, it was necessary to aver in the bill, that the debtor was a non-resident of the State and owned estate within the same, otherwise the bill would have been demurrable. Where the debt was an equitable debt, no such averment in the bill was necessary. In 1852 the Code of 1849 was amended so as to add these words at the commencement of sec. 11 of ch. 151 aforesaid, to-wit: "A claim to any debt, or to damage for breach of any contract against a person who is not a resident of this State, but who has real estate or debts due him within the same, may, if such claim exceed $20.00, exclusive of interest, be maintained in any court of equity for a county or corporation, in which there may be any such estate, or a defendant owing any debt to such non-resident." The effect of this amendment was to give to a creditor having a legal claim against a debtor residing out of the State, and owning effects or estate therein the same right to bring a foreign attachment-suit in equity, as he would have had before the Code of 1849, the only difference being, that since the amendment he has had an election to sue at law or in equity in such a case, where before the Code of 1849, he could sue in equity only. But no change was made in sec. 11 as to the affidavit to be given in a foreigu atttachment in equity for a legal demand. In such a suit brought under that section, amended as aforesaid, it is necessary to aver in the bill, that the debtor resided out of the State and has estate or effects therein, as it would have been necessary to make such an averment before the Code of 1849, otherwise the bill would be demurrable.

The grounds for equitable relief in such a case are there filed: First, that a debt is due to the plaintiff; second, that the debtor is a non-resident of the State; and third, that he has estate or effects within the State. These three grounds make up a good case in equity; and if they are proved, the plaintiff will be entitled to a decree on the hearing for the amount of the debt and for the application of the said estate and effects, as far as may be necessary, to the payment thereof. Certainly there can be no decree against an absent defendant without an answer, appearance or publication; and

there can be no publication without an affidavit of non-residence, and such an affidavit is therefore necessary where there is no answer or appearance of the non-resident debtor; but if the case be regularly matured for hearing and be fully proved, the plaintiff is entitled to a decree accordingly, except, against parties or persons, who may be injured by his non-compliance with some preliminary requirements of the statute. He is certainly entitled to such a decree against the debtor himself and against all who stand in his shoes. But even if any other affidavit than that of non-residence of the debtor were necessary in this case, it is well settled that the affidavit required by the statute to authorize the suing out of an attachment against the estate or effects of an absent debtor may be made either before or after the bill is filed. (*O'Brien* v. *Stephens*, 11 Grat. 610; *Moore* v. *Holt*, 10 Grat. 284.) Indeed it is expressly declared by the statute in the very section, which gives the remedy in this case, to-wit, sec. 11 aforesaid, that such affidavit may be filed at the time of or *after* the institution of the suit." The decree appealed from is interlocutory. What is there to prevent the affidavit from being now made, if any other affidavit be necessary, than that which has already been made?"

Fisher v. *March*, 26 Grat. 766, was a foreign attachment in equity. The suit was instituted in January, 1871. The first affidavit made by the agent of plaintiff's when the attachment was sued out was insufficient, and another affidavit was made by the same agent on April 7, 1871. The bill set out everything necessary to show a case for foreign attachment, and the second affidavit is to the truth of the matters set forth in the bill, and that affiant believes the debt set forth in the bill describing it is justly due from defendant to complainants and at the time of the institution of this suit they were entitled to recover the same, and have present cause of action therefor, and that defendant was a non-resident of the State. It does not appear, that after the second affidavit was made, there was any new *subpœna* issued or any further endorsement made therein. Moncure, President, speaking for the whole court said of the second affidavit:

"In regard to the affidavit to the bill if it be not now too late to object to it, we think it is substantially sufficient if it

is not in strict and literal compliance with the law. We speak especially in reference to the second affidavit which was made on April 9, 1871. It is no valid ground of objection to that affidavit that it was made after the instituting of the suit, nor that it was made by the agent of the plaintiffs instead of the plaintiffs' themselves. The affidavit states that 'the matters and things set forth in the bill are true,' and thus adopts it as a part of the affidavit."

The proceedings in this cause were much more regular than in *Moore* v. *Holt*, and *Cirode* v. *Buchanan*, and so far as the affidavit is concerned, very similar to the proceedings in *Fisher* v. *March*, and unless we are prepared to depart from the principles announced in the Virginia decisions, we can not hold the attachment in this cause to be no lien, because the second affidavit, confessedly good was made after the endorsement on the subpœna. In *Moore* v. *Holt*, the lien was held good, though the affidavit of non-residence was made long after the endorsement. That was the affidavit required under the Act of 1819, (and it was just as essential, that it should be made as an affidavit under the Code of 1860 as amended in 1867) *stating the nature of the claim, &c.* Yet the lien in that case was held to be prior to that of other creditors. *Cirode* v. *Buchanan* goes much further to sustain the lien in that case, than is necessary to sustain the lein in this cause. We do not wish to be considered as approving all that is decided in that case, nor are we at this time prepared to disapprove it. It is not necessary to express an opinion, whether that case propounds the law correctly or not. But we are prepared to say that in Virginia, the same strictness in the proceedings was never regarded in foreign attachments in equity as in attachments at law. Nor do we think that the statute requires the same strictness. It is a chancery proceeding against a non-resident, to subject his land to the payment of a debt. The bill gives him notice of everything necessary to show the debt, its nature and the proceeding against his land in the county, where the suit is instituted for the payment of the debt. If he appears, a personal decree can be rendered against him. If he does not appear, and an order of publication has been executed against him, the property will be sold to pay the debt.

In this cause seven years before the defendant, the Pittsburg, Cincinnati and St. Louis Railway Company, had any interest in the subject, the second affidavit which is in strict compliance with the statute, was filed, we think, according to all the Virginia authorities, that the plaintiff's lein was perfect at least from the time the second affidavit was filed. In domestic attachments at law, we have applied the strictest rule. (*Delaplain* v. *Armstrong*, 21 W. Va. 211; *Hudkins* v. *Haskins*, 22 W. Va. 643; *Capehart* v. *Dowery*, 10 W. Va. 135; *Hale* v. *Donahoe*, 25 W. Va. 414.) We do not desire to relax the rule in such cases. The attachment proceeding, is all the notice, that the defendant has in such cases. The affidavit lies at the very foundation. In chancery the proceedings were according to the rules of that court. The case for an attachment is fully set out in the bill. The court did not err in refusing upon the motion of the defendants, the Pittsburg and Steubenville Railroad Company, and the Pittsburg, Cincinnati and St. Louis Railway Company to quash the attachment because the affidavit was defective.

But it is further insisted, that there is no sufficient description of the land in the endorsement on the subpœna. It is described as a strip 100 feet wide in Hancock county, near Harmon's creek, on which there is a railroad bed and railroad track. We think that description sufficient; but it is clearly described in the bill and that must be looked to if necessary. This Court has held, that in such a case it was not material, that the order of attachment endorsed on the summons by the clerk should specify the property of the debtor mentioned in the affidavit, on which the order of attachment was issued. (*King* v. *Board*, 7 W. Va. 701.) Haymond, President, said: "It is proper that the bill should show that the debtor had estate or debts due him in the county where the proceeding or suit is had. But it is not essential to the validity of the attaching order and the levy thereof, that the property mentioned in the affidavit is not mentioned in the order in a proceeding of the character of this. This is not a suit in equity for the recovery of specific property from the defendant, Abraham Board, but as before stated, it is for the recovery of a debt from the absent debtor, by subjecting his estate, by order of attachment in the cause, to the payment thereof. Where the

suit is for the recovery of specific property, it is then perhaps material that the specific property, sought to be recovered should be material both in the affidavit and order. The attaching order in this case was levied on the real property of the absent debtor, mentioned in the affidavit, situated in Jackson county. Proceedings in cases of this kind under said eleventh section are the same as in other suits in chancery. The description in the levy together with that in the bill is entirely sufficient."

It is also assigned as error, that the decree directed a sale of a substantial and necessary part of the through line of railroad operated by the P. C. & St. L. R'y Co. The attachment was on no railroad in West Virginia. It was on a strip of land. We are now informed that the defendant-company has some chartered rights in West Virginia, and can under our laws exercise the franchise of a railroad company in this State. But the debtor company never had such rights in this State, and if *pendente lite* the P. C. & St. L. R'y Co. has acquired any interest in the attached subject, that company took it *cum onere*. It is no railroad that is attached, nothing but real estate, and as such it must be sold. (18 W. Va. 184.) This also disposes of the seventh assignment of error, that the decree directed the sale of the portions of land in Brooke and Hancock counties separately.

It is insisted, that the court erred in entering a separate decree in suit No. 3, instead of in the three suits consolidated. The suits were consolidated prior to the decree of February 22, 1877, which was rendered against the defendant, the Pittsburg and Steubenville Railroad Company, for the amount of the indebtedness, and an order of sale of the attached property in suits Nos. 1 and 2, and suit No. 3 was remanded to rules, to bring the legal title before the court, in order that the property attached in that suit might be sold. This had the effect to disunite the suits so far as the attachments were concerned, and they were ended as to all other matters. The entering of a separate decree in suit No. 3, did not prejudice the said defendant, the P. C. & St. L. R'y Co.

It is also assigned as error, that the court directed a sale of the land attached as being situated in Hancock county without having ascertained what land was levied on, it appearing

that there was but one strip of land running from the Ohio river to the Pennsylvania line, the whole of which had been returned as situated in Hancock county, and also in Brooke county. I do not so understand the levy in the respective suits or the description in the bills, but if it were so, it does not prejudice the defendant, as the sheriff of Hancock county will only sell so much of the said strip, as lies in Hancock county.

It is also insisted, that the court erred in failing to have the amounts and priorities of the first and second mortgage liens ascertained and fixed. We have already ascertained that neither of said mortgages constituted any lien on said attached property.

It is asigned as error, that the rights of the Western Transportation Company as lessees of the Pittsburg and Steubenville Railroad Company were not enquired into. We held in the former appeal, that said company being a lessee was not a necessary party to the suit. The decree is affirmed.

AFFIRMED.

WHEELING.

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CHAPMAN *v.* PITTSBURG AND STEUBENVILLE R. R. Co., *et al.*

(*Suits Nos.* 1 *and* 2.)

Submitted September 8, 1884.—Decided April 22, 1885.

1. When there has been in a foreign attachment suit in equity an ascertainment of the amount of the indebtedness due fro n the defendant to the plaintiff, and the debtor appeals from the decree so ascertaining the amount, which is affirmed, and the court below is proceeding to execute the decree by selling the attached property, it is too late for a claimant of the property to dispute the debt. (p. 326.)

2. Where under sec. 24 of ch. 106 of the Code a claimant of the property files a petition, unless the petition and the accompaning exhibits show a legal or equitable claim to the property, the court does not err in refusing to empannel a jury to enquire into the claim (p. 327.)

For a statement of these causes see the preceding cause and 18 W. Va. 184.

D. Lamb and *W. P. Hubbard* for appellants.

Ewing, Melvin & Riley for appellee.

JOHNSON, PRESIDENT:

After the affirmance of the decree of February 22, 1877, rendered in those two causes and in the preceding cause consolidated therewith and the order of sale of the attached property in those two causes these causes were remanded for further proceedings, and the Pittsburg, Cincinnati and St. Louis Railway Co., filed its petition setting up the same matters contained in its answers in the preceding cause (No. 3,) claiming title to the attached property and praying for a stay until the further order of the court of the proceedings under the said decree of February 22, 1877, so far as said decree directs the sale of the property therein mentioned, and an injunction forbidding the said George Marcus Chapman his attorneys and agents and especially the said J. E. Curtis, late sheriff, to make such sale or to cause the same to be made, and that by the order of the court in the above entitled suits the petetitioners be made a party to each of said suits with leave to answer and defend the same, and that such other order be made as petitioner's case may require, &c. The same facts appear as in the other record.

The petition was filed at the December term 1881, without prejudice to the right of the plaintiff to object or except thereto. On the 22d day of March, 1883, the final decree was entered in the causes. The causes were heard on motion of the plaintiff and against the objections of the defendant upon the decree of February 22, 1877, and upon the petition of the Pittsburg, Cincinnati and St. Louis Railway Company, setting up certain facts and applying to be made a party, to each of the causes with leave to answer and defend the same, and the said Railway Company, having given security for costs according to law, and the plaintiff having objected and excepted to said petitions, and the matters arising upon said petitions, and said exceptions were argued and submitted, and the Court being of opinion that the matters and

things in said petition set forth ought not to and do not operate against or affect the said decree of February 22, 1877, and that the said application of said Pittsburg, Cincinnati, and St. Louis Railway Company ought not to be granted, the same was overruled; and the court in the decree reciting that the sheriff, who was in office when said decree of 1877 was rendered, was no longer in office, ordered that the sheriff of the county proceed to execute said decree, &c.

After the opinion of the court had been announced, and after the draft of the decree had been placed in the hands of the court, the said defendant objected to the entry of the same and insisted, that whatever decree was entered should be entered in the three causes, which were consolidated on December 16, 1869. The court overruled the objection. At the same time, the latter motion was made, the said defendant moved to quash the attachment in the said two causes, which motion was overruled. The said defendant then filed its petition and bond for the removal of the said three causes to the circuit court of the United States for the District of West Virginia. The court held the petition and bond sufficient but overruled the motion and refused to enter an order for the removal of the cause.

From this decree the said defendant appealed.

There are a number of assignments of error in these cases, which were made and decided in the preceding case. Those which are peculiar to these causes we will consider.

The first error assigned is, that there ought not to be any sale of the attached effects, because the Pittsburg and Steubenville Railroad Company was not indebted to the plaintiff. That matter had been hotly contested between the debtor and creditor and was adjudicated by the decree of February 22, 1877, and had been affirmed by the court. It is now too late to raise that question.

It is strenuously insisted, that the court erred in rejecting the petition of the said defendant, that security for costs having been given, it was the duty of the court to have empanneled a jury to enquire into the claim of the petitioner. The provision of the statute, under which the defendant claimed the right to a jury, is found in sec. 24, ch. 106 Code of West Virginia as follows:

"Any person interested may file his petition, at any time before the property attached as the estate of the defendent is sold, under the decree or judgment, or if the proceeds of the sale have not been paid over to the plaintiff, or his assigns within one year after such sale, disputing the validity of the plaintiff's attachment thereon, or stating a claim thereto, or an interest in, or lien on the same, under any other attachment or otherwise, and its nature, and upon giving security for costs, the court without any other pleading shall impannel a jury to enquire into such claim, and if it be found, that the petitioner has title to, or lien on, or any other interest in, such property or its proceeds, the court shall make such order as is necessary to protect his rights."

It certainly can not be contented, that a proper construction of this section will permit mere naked legal questions to be submitted to a jury. This section can not be so construed. If the petition shows a *prima facie* right in the petitioner to the property in the petition, a title better than that of the defendant, then the court should impannel a jury to enquire into the claim; but if the petition with the accompanying exhibits shows clearly, that at the time the attachment was levied, the petitioner had no claim to the property and no interest in it, then it would be folly to impanel a jury to enquire into a claim which the petition itself showed, did not exist. The case cited, *Andrews* v. *Johnson*, 32 Grat. 558, is in harmony with this view. There the petition showed, if true, the petitioner had purchased the property, before it was at-attached.

The court in this case did not err in refusing to require a jury to be impanneled and in holding that nothing in said petition contained, could affect the decree of February 22, 1877. The reasons for this holding are set out at length in the preceding opinion, as the answer there was substantially the same as the petition here.

The motion to quash the attachments were properly overruled. The attachments are free from some of the faults in the attaehment in the preceding case (No. 3) and the order of sale therein was affirmed by the court, and this defendant has no right to disturb that decree, and if he had the right, we see no reason for disturbing it.

The court properly refused to enter an order for the removal of the cases to the circuit court of the United States. The application was made too late. It was not made until more than eighteen months after the petition was filed, and then not until the cause had been heard. Besides, it would be a singular spectacle to remove to the Federal court a cause, after it had been taken to the court of last resort in the State, and the final decree therein affirmed. (*Cable* v. *Ellis*, 110 U. S. 389; *Lynch* v. *Andrews*, 25 W. Va. 751.) The other assignments of error have been considered in the preceding cause.

The decree of the circuit court of Brooke county rendered in these two cases on March 22, 1883, is affirmed.

AFFIRMED.

WHEELING.

CHAPMAN *v.* P. C. & ST. L. RAILWAY CO.
(*Nos.* 1 *and* 2.)

SAME *v.* SAME.
(*No.* 3.)

ON RE-ARGUMENT.

JOHNSON, PRESIDENT:

These causes were before this Court and were decided on April 22, 1885, and the decrees in the said causes respectively affirmed. Upon petition of the defendant, the Pittsburg, Cincinnati and St. Louis Railway Company, the orders in said causes were set aside, and the causes again placed upon the docket for re-argument. At the present term they were re-argued and again submitted to the Court for decision.

The Court before decided that the attachments held the property, because among other reasons the mortgage-deed from which the defendant derived its title, did not convey the property in West Virginia. Of the correctness of that opinion, so far as the first mortgage-deed is concerned, there is in our minds no question. But it is argued and insisted, that

the second mortgage-deed did convey the property, and that therefore there was nothing to attach, until the second mortgage-creditors were paid. The second mortgage was executed on the same day, that the first was, to-wit, October 10, 1856, although dated August 1, 1856. It was executed by Isaac Jones, president of the Pittsburg and Steubenville Railroad Company, and Sidney F. Von Bonhorst, the secretary of said company, to Ambrose W. Thompson and Daniel Tyler, trustees. It recites: "Whereas the said Pittsburg and Steubenville Railroad Company in pursuance of the powers, rights and privileges conferred by the act incorporating said company and supplementary acts of the Commonwealth of Pennsylvania, and all and every other right, privilege and authority in that behalf, enabling them to complete their railroad, extend their works, provide locomotives, cars, machinery, depots and land therefor have for the completion and equipment of their road authorized their president and secretary to execute in the corporate name of said company" bonds of different denominntions. "Now this indenture witnesseth, that said Pittsburg and Steubenville Railroad Company, party of the first part, as well for and in consideration of the premises, and for the better securing the payment of the aforesaid bonds, &c., * * have granted, &c. the whole of their railroad together with the lands, depots, depot-grounds, and buildings situated at and between the termini of their railway, at the city of Pittsburg and the boundary line of the State of Virginia, in the counties of Allegheny and Washington in the State of Pennsylvania, and also all the property and franchises, and the tolls, issues, increase and profits, of the said company hereafter derived to them from the use of or travel on their said road, or any part thereof, and also all the cars, engines, locomotives, tenders, turntables, machinery, tools and railroad implements, horses or other things used in the business or management of said railroad, *and also all the interest of said railroad in property held in trust for them or for their benefit*, to have and to hold all and singular, the estate, hereditaments and premises, hereby granted, or intended to be, with the appurtenances, unto the said parties of the second part hereto, their heirs, executors, administrators, successors and assigns of such survivors and survivor, and to the survivors and sur-

vivor of them," &c., * * subject however to a certain mortgage bearing even date herewith made to Thomas McElrath, to secure, &c.

The following is also in said deed: "Provided also, and it is hereby expressly understood and agreed to by all the parties hereto, that if at any time during the continuance of this mortgage, the party of the first part hereto, (with the concurrence of the parties of the second part, their successor or successors in the trust) shall deem it advantageous to the interests of the said company to sell and dispose of any of their said depots and grounds belonging thereto, *or any other of their real estate situated as aforesaid*, then and in such case, it shall and may be lawful for the said parties of the second parts their successor or successors in the trust, to execute to the party of the first part, and to the purchaser or purchasers thereof a full and entire release and discharge of the lien of this mortgage *on or upon the same*; that the said party of the first part shall have the right to sell, exchange, dispose of, and renew any of their engines, cars, machinery and other of their personal property when from time to time it shall be necessary in good faith to do so for the interest and welfare of the road, and the profitable direction and management of the same, without the concurrence of the said trustee or his successor or successors in the trust, and any other real estate *situated as aforesaid* and *personal estate wherever situated*, which shall or may be purchased," &c.

It is insisted by counsel for the Pittsburg, Cincinnati and St. Louis Railway Company, that this mortgage deed passed *all the real estate held in trust*, for the Pittsburg and Steubenville Railroad Company, *situated in Hancock and Brooke counties, Virginia*, claiming, that at that time real estate was so held in said county. Counsel argue, that the deed should be so construed, that every part thereof will if possible be made operative. This is a correct rule of construction. (*Salisbury* v. *Andrews*, 19 Pick. 250; *Ammidown* v. *Ball*, 8 Allen 293.) A general description of property in a deed is sufficient to pass the title thereto, provided the property is so designated that it can be known what property is intended to be conveyed. It is claimed by counsel for the railway company, that the generality of its language forms no objection to the

validity of the clause of the deed under consideration. He cites to sustain this position, (*Wilson* v. *Boyce*, 12 U. S. 320; *Railroad* v. *Trimble*, 10 Wall. 367; *Munday* v. *Vawter*, 3 Grat. 518, *Id.* 609; *Warren* v. *Syme*, 7 W. Va. 493; *Wickham & Goshorn* v. *Martin & Co.* 13 Grat. 427; *Coleman* v. *Manhattan Beach Co.*, 94 N. Y. 229; *The People, ex rel* v. *Storms*, 97 N. Y. 364; *Buck* v. *Seymour*, 46 Conn. 156.)

In *Wilson* v. *Boyce*, *supra*, it appears that the Cairo and Fulton Railroad Company accepted Missouri State bonds issued under an act of the legislature, which declared that they should "constitute a first lien and mortgage upon the road and property" of the company. Subsequently to the receipt of the bonds the company executed a deed of trust upon its lands, which had been granted by Congress to aid in the construction of the road. Boyce claimed the lands situate in Scott county, Missouri, by virtue of a sale made under the act of the legislature declaring the mortgage on the land, and Wilson claimed under a sale made under the deed of trust. Boyce was in possession of the lands and Wilson brought an action of ejectment to oust him. The court held, that the word "property" included all the lands of the said company, and that a valid lien was created on them by the acts.

In *Railroad Co.* v. *Trimble*, 10 Wall. *supra.*, it was held, that a deed, by which a party conveys "all his property and estate whatsoever and wheresoever, of every kind and description" carries patent rights and extensions, if the party own any.

In *Munday* v. *Vawter*, 3 Grat. 494, it was held, that a conveyance of "all the estate, both real and personal" to which the grantee "is entitled in law or equity in possession, remainder and reversion is valid to pass the grantor's whole estate.

In *Wickham & Goshorn* v. *Martin & Co.*, 13 Grat. 427, *supra*, the grantor and trustee both lived in Virginia, where the deed was executed; the goods, which the insolvent merchant had bought but had not paid for, were sold in Baltimore and were sent by the purchaser to Ohio apparently for the purpose of concealing them, and the seller of the goods there got possession of them, after the trustee had taken posses-

sion, and the trustee sued the seller in Virginia for the goods. It was held that the deed was to be construed according to the law of Virginia. The deed after conveying the debtor's property, describing it by its location, which did not include the goods in controversy, and after stating the trusts, upon which it was conveyed, in the conclusion contains the following: "And it is further expressly understood, that if through accident, or forgetfulness, or inattention, the said M. G. (the grantor) may have omitted to mention any claim or property, that the same shall be understood as being conveyed hereby to the said trustees, to all intents and purposes as if specifically mentioned." It was held that the goods in Ohio passed by the deed.

In *Warren et ux* v. *Syme*, 7 W. Va. it was held, that intrinsic certainty in a deed relative to specific property is impossible. The description can be made certain only by proof or recognition of the identity of the subject, to which it relates, or other objects or things that more or less directly and distinctly indicate and determine it. And in the application of deeds and other documents to lands and lots extensive latitude for the discovery and proof not only of visible monuments or objects mentioned but of mathematical lines of other lands and lots and various other classes of facts, to which the description or suggestions in the document may apply.

In *Coleman* v. *Manhattan Beach Company*, 94 N. Y., it was held, that while it is essential that premises, upon which a grant is to operate, must be so described therein, that they can be identified, it is not necessary that they should be described by boundaries, courses or distances or by reference to monuments; where words of general description are used oral evidence may be resorted to to ascertain the particular subject-matters, to which they apply, and if with the aid of such evidence the premises can be located, the grant will not fail. The deed in that case described the granted premises as "Pelican Beach near Barren island"; and it was held not void for uncertainty.

In *The People ex rel.* v. *Storms*, 97 N. Y. 364 it was held, that a mortgage will not be held void by reason of vagueness or uncertainty in the description of the mortgaged premises,

if by any particulars in the description they can be ascertained so as to enable the court to say, that the words used were intended to relate to them; further, that for this purpose evidence *aliunde* the instrument may be resorted to if the deed refers to some subject-matter, by the aid of which the description may be located and applied, it is sufficient. So also if there be two phrases in the description which can not be reconciled, one of which will defeat, the other sustain the instrument, the former will be rejected. Danforth, Judge, in delivering the opinion of the court said of the description: "There is here a clear designation of the county, town and lot, where the mortgaged premises may be found, of the quantity to be mortgaged and a specific location of the same, as on 'the south side of it, next to Mr. Norton's.'"

In *Buck* v. *Seymour*, 46 Conn. 156, it was held, that the property to be acquired by a railroad company could be held by a mortgage of such property before acquired, and the description of the after-acquired property as "all property, which may hereafter belong to said company and be used as a part of said road," was not too indefinite.

In *Mathews* v. *Jarretts*, 20 W. Va. 415, it was held, that in a suit for the specific execution of a contract for the purchase of land, where neither the contract itself, nor the extrinsic proof of the surrounding circumstances, identifies or defines the tract or boundaries of the land nor refer to anything, by which it may be identified with reasonable certainty the Court will not decree a specific performance but will dismiss the bill.

"In construing a deed" says Washburne, Vol. 3, 384, "the court places itself as nearly as possible in the situation of the contracting parties; and their interest will be ascertained in the same manner as in the case of any other contract. If the intention is not then apparent from the deed, resort is to be had to the rules of construction, which give greater effect to those things about which the law presumes the parties are the least liable to make a mistake. But arbitrary rules are not to be invoked, if the intention of the parties can be plainly discovered without their aid." This is taken from *Kimball* v. *Semple*, 25 Cal. 449.

It has been held, that, if the estate can not be ascertained

by the description in the grant, the deed fails altogether, thus where the terms of the grant recited, that it was part of a certain patent bounded by other lands named, "and supposed to contain 400 acres, whereby about 100 acres were struck off to J. W. 'Now know ye' &c. "do grant, bargain and sell the before mentioned premises to the said J. W." it was held void for want of a sufficient description to show what premises were granted. (*Peck* v. *Mallam*, 10 N. Y. 509: *Dury* v. *Cray*, 10 Wall. 270; *Hill* v. *Mogry*, 6 Gray 551; *Boardman* v. *Reed*, 6 Pet. 345.)

The rule laid down in *Boardman* v. *Reed*, 6 Pet. is "The entire description of the deed must be taken, and the identity of the land ascertained by a reasonable construction of the language used." This is undoubtedly a correct rule. But when words of general desciption are used, oral evidence may be resorted to to ascertain the particular subject-matter to which they apply, and if with the aid of such evidence the premises can be located, the grant will not fail. *Coleman* v. *Improvement Co.*, 94 N. Y. 229. But such evidence can not be used to supply any omission or defect in the terms of the deed. And there is another rule laid down in *Railroad Co.* v. *Trimble*, 10 Wall. 367 to be observed in construing a deed, which is also correct, and that is: Where there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it, is entitled to great consideration; but where its meaning is clear, an erroneous construction by them will not control its effect.

Now giving this mortgage a reasonable construction does it or does it not include the West Virginia land? It must be observed first, that the corporation, that executed the mortgage, was created by the legislature of Pennsylvania, and it as such corporation had no right to go any where outside of that State to do any business except by the authority of the State, into which it intended to migrate. As we have said in the opinion before delivered, and with which in this respect we are entirely satisfied, the first mortgage limits the property conveyed by it to the termini of the road, which are in the State of Pennsylvania, and that deed did not and could not by any reasonable construction include the West Virginia lands. The same language precisely as to the authority

of the corporation and the limit of its road, and the description of the property, substantially is used in the second mortgage as in the first, except in the second the words "and also all the interest of said railroad in *property* held in trust for them or for their benefit." What kind of property, we are not informed. In a subsequent part of the deed we are made to understand, where it is situated, if it is *real* propety. In the proviso power is retained by the party of the first part, the railroad company, during the continuance of the mortgage with the concurrence of the parties of the second part, if deemed advantageous to the company, to sell and dispose of any of their "said depots and grounds belonging thereto, or any of their *real estate situated as aforesaid*," also to sell or exchange the personal property, and any other *real estate situate as aforesaid*, and personal estate *wherever situate*, which shall or may be purchased, &c. The only State mentioned where any of the property is situated, is Pennsylvania. Virginia is not referred to in the whole deed except in such a manner as to indicate that nothing granted was situated in that State. After the words, "and also all the interest of said railroad in property held in trust for them or their benefit," it *real estate* is meant by the word "property," words are used which clearly indicate where it is situated, where it is said, in referring to what had been granted, in giving a right to dispose of it, "said depots and grounds belonging thereto or any other of their *real estate situate* as aforesaid. Where situated? Referring back to the first of the deed, we find this: "The whole of their railroad, together with the lands, depots, depot-grounds and buildings *situated at and between the termini of their railway at the city of Pittsburg, and the boundary line of the State of Virginia in the counties of Allegheny and Washington in the State of Pennsylvania.*" This idea is still further borne out by the clause, giving the grantee the right to sell or exchange the personal property and "any other real estate *situated as aforesaid*, and personal estate *wherever situate*, which shall or may be purchased," &c., showing that the mortgage did not contemplate any real estate purchased or to be purchased except that *situated as aforesaid*, that is, between the *termini* of their road in Pennsylvania. The personal property might exist anywhere. It might be bought in the east and be

sold, or exchanged, before it came upon their road. It is asked then: What effect can be given to the clause? It might have referred to *personal property* held in trust, or the scrivenor might have thought it would add strength to the description of the real estate in Pennsylvania; for as it is not shown in this record how it was held, it may have all been held in trust for the company. This is certainly unlike the class of cases, where the whole grant is "all the property owned by the grantees." In these cases there seems no difficulty in saying *what* property was intended; for wherever any property of the grantor is found, that passed, as *all* was included. Here effect can and should be given these words without doing violence to others of the deed.

Again under the rule laid down in *Railroad Co.* v. *Trimble*, 10 Wall. *supra*, this view, which we have taken, is much strengthened by the construction the parties themselves put upon the deed. It seems, that for ten years they treated the second mortgage, as they did the first, as though it did not include the West Virginia lands. The acknowledgments to the deeds imply, that it was not contemplated, that they should be recorded in Virginia, but in Pennsylvania only. A commissioner in New York appointed by the governor of Pennsylvania took one of the acknowledgments. The deed from Jones to Thompson and Tyler, and from Thompson and Tyler to Seabrook, trustee, which do describe the Virginia lands, were acknowledged by commissioners for Virginia. The recordation in Pennsylvania took place at once, it is presumed, but not for more than ten years in Virginia, and not until attachments were sued out in all of the causes. Thompson and Tyler were parties to the Pennsylvania suit, by virtue of the second mortgage, in which they are trustees; and they say nothing about any interest in West Virginia lands. As our former opinion will show, there was no claim in any of the pleadings in the Pennsylvania suit either by plaintiffs or defendants, that the first mortgage included the West Virginia lands; and the same is true as to the second mortgage. In that suit it was not claimed by any of the parties, that the second mortgage passed any interest in the Virginia lands. The whole bearing of all the parties for more than ten years indicated, that it was not understood by

any one, that the second mortgage any more than the first embraced the Virginia lands. I think, that according to the well established rules of construction the second mortgage can not be held to pass title to the Virginia lands.

I have been discussing the question, as though it appeared from the record, that at the time the second mortgage was executed, to-wit: on October 10, 1856, there were lands in West Virginia held in trust for the Pittsburg and Steubenville Railroad Company. My associates express no opinion upon the legal questions by me discussed above, for the reason that in their opinion it is not necessary, as the record does not show, that at the date of the second mortgage the lands in controversy or any other lands were held in trust for said company in Virginia.

The deed from Isaac Jones, to Daniel Tyler and Ambrose W. Thompson, which is dated November 27, 1856, and acknowledged on the same day nearly four months after the second mortgage deed, and more than a month after the execution thereof, is the first deed appearing on the record, which shows that any lands were held in trust in Virginia for the said railroad company. If any trusts existed before that time, which would in equity entitle the said railroad company to any interests in the Virginia lands, they were secret trusts; and there is no evidence that any such trusts existed. For aught that appears in the record the Pittsburg and Steubenville Railroad Company might have acquired an interest in the lands mentioned in said deed on the day it was executed. This is conclusive of the point, on which the re-argument was granted.

The Court sees no reason to change its opinion on the other points formerly decided. The same decrees, which were on April 22, 1885, entered in these causes respectively, will now be again entered, and the opinion in said causes will now be again handed down.

AFFIRMED.

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WHEELING.

STATE v. COOPER.

Submitted June 23, 1885.—Decided July 9, 1885.

1. Our statute, authorizing the State to obtain and prosecute writs of error in this Court from judgments of the circuit courts in revenue cases, is constitutional and valid.

2. A new trial ought to be granted, on the ground that the verdict is contrary to the evidence or the facts proved, only in cases of plain deviation from right and justice, not in a doubtful case merely because the court, if it had been on the jury, would have gived a different verdict.

3. If in such case, the question depends upon the weight of testimony, or inferences and deductions from facts proven, the jury and not the court, are exclusively and uncontrollably the judges.

4. A case, in which the judgment of the circuit court setting aside the verdict of the jury and granting a new trial, is reversed, because the facts proved were, in themselves, equivocal and inconclusive and the verdict, necessarily, dependent upon inferences to be drawn from these facts.

The facts of the case will be found in the opinion of the Court.

R. C. McClaugherty for plaintiff in error.

Alfred Caldwell, Attorney-General, for the State.

I submit to the court that the writ of error in this case was improvidently awarded, for the reason that no final judgment had been rendered. The Code, ch. 135, § 1, as amended by ch. 157, Acts 1882, provides that a writ of error or *supersedeas* may be granted by the Supreme Court of Appeals: "Tenth.—In a criminal case, where there has been a conviction," &c. This is a criminal case, and there has been no conviction in it. It is only in civil cases that an appeal may be taken from an order granting a new trial. (Code, ch. 135, § 1, as amended ch. 157, Acts 1882.)

The statute authorizing writs of error by the State in revenue cases is constitutional. (*State* v. *Allen*, 8 W. Va. 680; *State* v. *Fitzpatrick*, *Id.* 707; *State* v. *Kyle*, *Id.* 711.)

The Constitution of 1863 contains a similar provision to the one invoked in this case; yet in *State* v. *Church* (4 W. Va. 745,) no question seemed to arise in the minds of the court as to the constitutionality of the law.

The Constitution simply prohibits the re-examination of the facts tried by a jury otherwise than by the setting aside of the verdict and the granting of a new trial or by proceedings in error in an appellate court. (*Barlow* v. *Daniels & Co.*, 25 W. Va. 512; *Parsons* v. *Bedford et al.*, 3 Pet. 447.)

If the State has the right to a writ of error in a revenue case, it necessarily follows that the appellate court may order the verdict to be set aside and a new trial to be had; and in view of our statute-law relative to writs of error in such cases the trial-court may set aside the verdict for any error, which would justify the court above in doing so.

The second assignment of error is that the evidence sustained the verdict.

It seems incredible that small sums of money amounting in the aggregate to $1.20 could from time to time be cast upon the seat. where the defendant was sitting, without his knowledge, and yet he get the money.

SNYDER, JUDGE:

William A. Cooper was tried by jury at the November term 1882, of the circuit court of Mercer county, upon an indictment for selling spirituous liquors without a State license therefor. A verdict was found for the defendant which the court on the motion of the State set aside and ordered a new trial. The defendant excepted to this action of the court and obtained this writ of error.

The only question presented to this Court is, did the circuit court err in setting aside the verdict of the jury and granting a new trial? The plaintiff in error insists that this action of the court was erroneous because the evidence sustained the verdict of the jury.

The bill of exceptions certifies that the following are all the facts proved on the trial:

"The State proved by one Stovall that within twelve months next preceding the finding of the indictment, in the county of Mercer, the witness and two other persons met the defendant near Princeton and had some conversation with him; witness stated to him that he wished he had

known he (defendant,) was coming down from Tazewell, Va. as he would have gotten him to bring him some whisky; thereupon defendant told witness that he had some whisky which he would divide with his friends and drew a bottle from his saddle-bags which he had thrown over the seat of the Jersey wagon in which he was riding; the crowd drank in this way about three pints; witness and his two companions offered several times to buy the whisky from defendant, but he as often declined to sell, saying he had no whisky to sell, that he only had some for himself and his friends; witness asked what whisky was worth and defendant said he was not selling but it was worth sixty cents per pint; and witness stated that he and his companions threw, he thought, as much as $1.20 on the seat of the Jersey wagon where defendant was sitting, from time to time during the time aforesaid, but he did not know that defendant saw the money or that he ever got it."

A new trial asked on the ground that the verdict is contrary to the evidence or the facts proved, ought to be granted only in a case of plain deviation from right and justice, not in a doubtful case merely because the court, if it had been on the jury, would have given a different verdict. *Miller* v. *Ins. Co.*, 12 W. Va. 116; *Sheriff* v. *Huntington*, 16 *Id.* 308; *Black* v. *Thomas*, 21 *Id.* 709.

In Virginia and this State the courts have always guarded with jealous care the province of the jury. If the question depends upon the weight of testimony, or inferences and deductions from the facts proved, the jury and not the court, are exclusively and uncontrollably the judges. This conclusion is based upon the well established rule, that the jury are the sole judges of the evidence, the credibility of all admissible testimony and inferences from the facts and circumstances proved. *State* v. *Thompson*, 21 W. Va. 741; *State* v. *Batsell*, 11 *Id.* 703.

The principles announced in these cases, and many others that might be cited, show very plainly that the court, by setting aside the verdict in the case at bar, violated the settled rules of law in this State. The facts proved are, of themselves, inconclusive and merely raise presumptions from which the jury might draw a conclusion, either that the defendant was

guilty or that he was innocent. This was particularly a case to be determined by the jury. The conclusion, necessarily, depended upon inferences to be drawn from equivocal facts and when the jury made these inferences and announced their verdict, the court could not interfere without a plain and manifest disregard and violation of the settled and fundamental principles of law governing trials by jury in this State. If the verdict had been for the State, it would have been equally conclusive, and in neither case would the court have been justified in setting it aside. The circuit court, in my opinion, clearly erred in setting aside the verdict in this case and its judgment must, therefore, be reversed and a judgment entered by this Court for the defendant upon the verdict of the jury.

REVERSED.

WHEELING.

LOVE v. PICKENS *et al.*

Submitted June 12, 1885.—Decided July 9, 1885.

To give this Court jurisdiction in a cause involving matters simply pecuniary, the record must show not only that the party complaining has been prejudiced by the decree or judgment of the inferior court, but also that the amount in controversy in this Court exceeds the value of $100.00 exclusive of costs.

GREEN, JUDGE, furnishes the following statement of the case:

From November 23, 1878, there was pending in the circuit court of Barbour county an action of debt brought by James Pickens against Byron Love and David Queen on a single bill dated August 9, 1875, for $150.00 with interest from its date. In this suit usury was pleaded, and, the case not having been tried, on May 9, 1879, Byron Love, one of

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the defendants, filed in the circuit court of Barbour county by leave of the court his bill of injunction to stay the proceedings in this common law case and asking that this question, whether or not there be usury in the transactions, out of which the executing of this single bill arose, and the extent of such usury, be inquired into in the court of equity, and that a discovery of these usurious transactions be made by said Pickens. His co-obligor in said single bill was made a defendant together with James Pickens; and the transactions, out of which this single bill arose, are stated in the bill but need not here be stated. The prayer of the bill was:

"That the said defendants may be made parties to this bill and answer the same upon oath as the law requires; that the defendant James Pickens be enjoined and restrained from further proceedings in the said suit at law until these matters shall be inquired of and as the court may then direct; may your orator, upon mature consideration of the premises, be relieved from all usurious extortions in these transactions, and the amount and extent of the same be fully inquired of and ascertained; and may your orator have all further and general relief herein; and a summons, issued," &c.

The injunction prayed for was awarded, and the bill was demurred to as well as answered by James Pickens. The demurrer was overruled. Depositions were taken in the cause. And on a motion to dissolve this injunction made in vacation by James Pickens the judge of the circuit court of Barbour county made this order on June 12, 1882: "It is adjudged, ordered and decreed that the said injunction so granted as aforesaid as to $105.00 of the debt in the bill and proceedings mentioned with interest thereon from August 9, 1876, be dissolved, and as to the residue thereof, to-wit, $45.00 with interest as aforesaid the said motion to dissolve said injunction is overruled, and it is directed that this order be entered of record by the clerk of the circuit court of Barbour county."

On November 4, 1882, the court entered the following final decree in said cause after reciting the previous proceedings in said cause:

"And the court proceeding to ascertain the aggregate sum of the debt and demand at law which the said Pickens is entitled to recover in these proceedings, and finding the said amount to be $144.25, as of this date, and nothing further being done or shown since the said vacation order why there should not be entered a final decree herein, it is therefore adjudged, ordered and decreed that the said action at law of the said James Pickens be and the same is hereby discontinued and stricken from the law docket of this court, but with costs at law against the said defendant. And it is further adjudged, ordered and decreed that the said James Pickens is entitled to and may have herein execution for the said aggregate sum of $144.25, with interest thereon from November 4, 1882, until paid, and his said costs at law against the said Byron Love and David Queen, and that as to the residue of his said debt and demandat law the said injunction against the said Pickens be and remain perpetuated, and that the said Byron Love recover of and from the said defendant, James Pickens, his costs in this cause expended."

James Pickens in his petition for an appeal and *supersedeas* assigns the following errors: The court erred first, in overruling his demurrer; second, in dissolving the injunction by this vacation-order as to $105.00, when he should have dissolved it as to $123.00, and continued it only as to $27.00; and lastly the court erred in its decree of November 4, 1882, in decreeing against Love and Queen in favor of the petitioner, Pickens, only $144.25, when the decree should have been for $168.95. Upon this petition an appeal and *supersedeas* was granted to James Pickens to the vacation-order of June 12, 1882, and the decree of November 4, 1882.

A. G. Reger & Son for appellant.

Dayton & Dayton for appellee.

GREEN, JUDGE:

It has been often decided and may be regarded as perfectly well settled law, that, to give this Court jurisdiction in a cause involving matters simply pecuniary, the record must show not

only that the party complaining has been prejudiced by the decree or judgment of the inferior court, but also that the amount in controversy in this Court exceeds the value of $100.00, exclusive of costs. (*Greathouse* v. *Sapp*, *supra*, 87; *Neal's Adm'r* v. *Van Winkle*, 24 W. Va. 401, pt. 1 syl.; *Rymer* v. *Hawkins*, 18 W. Va. 309; *Bee* v. *Burdett*, 23 W. Va. 744.) The whole amount of the debt of the appellant, which he sued upon, was $150.00 with interest from August 9, 1875, which on November 4, 1882, when the final decree was rendered, amounted to $215.13. He obtained a decree against both the parties, who, he claimed, owed him this debt, for $144.25 and for his costs in the common law suit, only $70.88 less than the full amount of his claim. In fact he did not dispute that the appellees were entitled to some abatement from his full claim of $215.13, and he only claimed, as is shown by his petition for an appeal and by the argument of his counsel in this cause, that he was entitled to a decree for $168.95, that is, for $24.70 more than the decree rendered by the circuit court. The real matter in controversy therefore in this Court is this $24.70. But if we look only to such part of the record, as I have thought it necessary to set out, the matter in controversy in this Court exclusive of costs might amount to $70.88 with interest from November 4, 1882. It is clear, therefore, that under no possible view of this cause is it possible to make the matter in controversy in this Court equal to $100.00. We have therefore no jurisdiction to hear and determine this cause; and the appeal and *supersedeas* ought not to have been awarded, and it must now be dismissed as improvidently awarded.

DISMISSED.

WHEELING.

GARRETT *v.* RAMSEY *et al.*

Submitted June 9, 1885.—Decided July 9, 1885.

1. The practice of inserting in a demurrer to evidence the evidence on both sides is proper. (p. 349.)

2. In such case the demurrant must be considered as admitting all that can reasonably be inferred by a jury from the evidence given by the other party, and as waiving all the evidence on his own part, which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. (p. 349.)

3. The evidence on a demurrer to the evidence should be interpreted most benignly in favor of the demurree; so that he may have all the benefit, which might have resulted from the decision of the case by a jury, the proper forum, from which the decision has been withdrawn by the demurrant. (p. 349.)

4. Uninterrupted, honest and adverse possession for ten years in this State gives a right to recover land in an action of ejectment against the strongest proof of title, which independently of such continued adverse possession would be the better title. (pp. 364-5.)

5. Where there are conflicting grants or deeds to lands causing an interlock, and the elder grantee or owner is in the actual possession of a part of his land outside of the interlock, and the junior grantee or adverse claimant is in the actual possession of a part of the interlock claiming the whole to the extent of his boundaries, such possession of the former outside of the interlock will not limit the possession of the latter to his mere enclosure, but he will be held to be in the adverse possession of all the land in the interlock.—*Green, Judge, dissenting* on this last point. (p. 350.)

GREEN, JUDGE, furnishes the following statement of the case:

At April rules 1874 Hugh Garrett filed his declaration in ejectment in the circuit court of Harrison against John W. Ramsey and George F. Bussell claiming in fee a tract of land set out by metes and bounds lying in said county and containing 140 acres, from which he had been ejected by the defendants, laying his damages at $1,000.00. On May 25, 1874, the defendants pleaded not guilty; and an order of survey was made and the case tried by a jury. On June 16, 1875, the

jury found a verdict for the plaintiff for a part of the land named in the declaration, the boundaries of the part so found being set out in the verdict. They found that the plaintiff was entitled to a fee in this part of the land found for him, and that the defendants were in possession of this part so found claiming title to it, when this action was commenced. On the motion of the defendants this verdict was set aside, and a new trial was awarded. On the second trial the jury found on December 15, 1875, for the plaintiff two separate parts of the land named in the declaration, these two parts being severally described in the verdict by metes and bounds. The verdict further found, that the plaintiff has an estate in fee simple in these parts of this land found for him. The defendants again moved the court for a new trial; and the court again set aside the verdict and granted a new trial upon their paying the costs incurred by the plaintiff. It is stated in the record, that the plaintiff took a bill of exceptions; but none appears in the record before us.

On May 23, 1881, a jury was again sworn to try the issue in this case, and the plaintiff and defendants introduced their evidence; and when it was all in, the defendants filed their demurrer to the evidence of the plaintiff, and the plaintiff joined in the demurrer, and thereupon the jury being required to find for the plaintiff part of the land in the declaration mentioned and to assess the damages which the plaintiff had sustained, if judgment should be given for the plaintiff on this evidence, found for the plaintiff, subject to the opinion of the court upon the demurrer to the evidence, a certain part of the land in the declaration mentioned described in the verdict by metes and bounds. They further found for the plaintiff an estate in *fee simple* in this part of said land and one cent damages against the defendants; but if the law arising upon the demurrer to the evidence should be for the defendants, they found for the defendants. The fact proven by the demurrer to the evidence, if construed as the law requires it to be on a demurrer to the evidence, was that the plaintiff failed to trace his title to the land in controversy by a regular chain of title to the State of Virginia, but did trace it by a regular chain of title to James Warren, who on November 30, 1836, conveyed a tract of 140 acres covering the land in

controversy to George A. Sommerville, whose title, the evidence showed, was held by the plaintiff.

The defendants claimed the land in controversy by a regular chain of titles to the State of Virginia and to a patent granted on October 20, 1786, for 500 acres of land to William Barkley, a portion of this 500 acre tract covering the land in controversy, and to it, the evidence showed, the defendants had the best title, they connecting their claim with the grant from the State of Virginia dated October 20, 1786. The tract of 140 acres named in the declaration, to which the plaintiff had a claim, so far as it covered the land in the controversy, was claimed by the plaintiff by a regular chain of title from the deed made by James Warren to George A. Sommerville on November 30, 1836. But it was proven that James Warren had no title to that portion of this land, which is in controversy in this suit. But this tract of 140 acres was by a mistake so surveyed, when Warren conveyed to Sommerville in 1836, that the lines in the deed also covered the disputed land, which was therefore an interlock between the tract of 140 acres claimed by the plaintiff and the portion of the tract of 500 acres claimed by the defendants. And the paper title of the defendants was better than that of the plaintiff, defendants' title coming from the grant of the State of Virginia made in 1786, while the plaintiff's title originated in the conveyance made in 1836, the grantor in the deed made in 1836 having no title in fact to this 140 acres, so far as it covered the land in controversy, but a perfectly good title except to that portion covered by the land in controversy.

The plaintiff's claim on this demurrer to evidence is based solely on the evidence in relation to the possession in fact by him of a portion of this interlock for more than ten years prior to the institution of this suit. There was no controversy as to this claim; but the land really in controversy was that portion of the interlock, which was in the boundary of the plaintiff's tract of 140 acres, but which was not in his actual possession, but which he claimed was in his constructive possession, because he was in the actual possession of two small parcels of the interlock, the evidence showing that he had been in the actual possession of two small enclosures one containing eight acres and fifteen poles and the other three

fourths of an acre. The facts appearing from this demurrer to evidence with reference to the possession were as follows: The defendants and those under whom they claim had actual possession of a considerable portion of that part of the tract of 500 acres patented by the State of Virginia in 1786, to which they had a good title, and they had held possession of a portion of this land for more than fifty-three years prior to 1876; but no part of this land so in their actual possession was within the interlock or was any part of the land in controversy, though they claim, that the whole land in controversy was all this time in their constructive possession, as the boundaries of their tract covered the whole land in controversy. They did not take actual possession of any portion of the land in controversy within the interlock till 1870, about four years before the institution of this suit, when they opened a coal mine on it.

The evidence in reference to the possession of the plaintiff construed as it must be on a demurrer to evidence by the defendants would establish the following facts: Those under whom the plaintiff claim this tract of 140 acres first took possession of a small part of it, some fifty acres outside of this interlock, in 1847, a small portion of which may have been within the interlock. He took possession of about three fourths of an acre inside the interlock in 1853 and cultivated it for some two years and has since then always claimed and used it as a part of his land. In 1856 the plaintiff had about eight acres more on the interlock cleared and enclosed and cultivated it in crops for three years and then put it in pasture for some eleven years, when he again cultivated it in corn and the next year in wheat and then had it in pasture. So that taking the evidence more favorably for the plaintiff, he must be regarded as in continuous actual possession of this eight acres of land within the interlock from 1856 to 1874, when this suit was brought by him, based on this possession.

These being all the facts proven, the court on the demurrer to evidence of the defendants on September 22, 1881, rendered the following judgment:

"This day came again the parties, by their attorneys, and the court having maturely considered the demurrer to the

evidence joined at the last term of this court, it seems to the court the matter now in evidence to the jury is not sufficient in law to maintain the issue on the part of the plaintiff. Therefore it is considered by the court that the plaintiff take nothing by his suit, but for his false clamor be in mercy, &c.; and that the defendants go thereof without day and recover against the plaintiff their costs by them about their defence expended."

On the petition of the plaintiff a writ of error and *supersedeas* was granted him to this judgment.

John Bassel for plaintiff in error.

Edwin Maxwell for defendant in error.

GREEN, JUDGE:

In this case the defendant demurred to the evidence; and the evidence on both sides was properly inserted in the demurrer, as is well established by the authorities. (*Muhleman* v. *National Insurance Company*, 6 W. Va. 508, point 1 of syllabus.) In such case the demurrants, in this instance the defendants, must be considered as admitting all that can reasonably be inferred by a jury from the evidence given by the other party, in this case the plaintiff; and as waiving all the evidence on his own part which contradicts that offered by the other party, in this case the plaintiff, or the credit of which is impeached, and all inferences from his own evidence, which do not necessarily flow from it. (*Muhleman* v. *National Insurance Company*, 6 W. Va. 508, point 2 of syllabus.) As the demurrer to evidence by the defendants withdrew from the jury, the proper tryers of facts, the consideration of the evidence, by which the facts are to be ascertained, the plaintiff, whose evidence in this case was thus withdrawn from its proper forum, is entitled to have it most benignly interpreted by this substitute for the jury. The plaintiff in this case ought therefore to have all the benefit in the consideratfon of the demurrer to the evidence, that might have resulted in his favor from a decision of the case by the jury. (*Miller, use, &c.* v. *Insurance Company*, 8 W. Va. 515, point 2 of syllabus.)

If the evidence in this case is weighed according to these

well established rules, the case will present but the single question: Whether the possession by the junior patentee or party having the worse paper title will be limited to his enclosure, when the elder patentee or party holding the better paper-title has actual possession of a part of the land embraced in his grant or boundaries set out in his deed but not embraced within the limits of the grant, junior patent or the boundaries set out in the deed of the party holding the worse paper-title, that is not embraced in the interlock? This question was made a *quære* in *Overton's Heirs* v. *Davisson*, 1 Gratt. 212, point 7 of syllabus, and to this day remains a mooted question in the Virginia courts, and has never been decided or even considered in the Supreme Court of Appeals in West Virginia. In considering this question it is all important, that we have a clear and distinct conception of several definitions and propositions, which may be regarded as undisputed here in this State and in Virginia.

First.—Adverse possession is one dependent on *adverse and conflicting title* grounded upon an *ouster* of the rightful owner, and which in case of a *freehold* is known as a *disseizin*. To constitute *adverse* possession there must be a possession *under claim of title*, and it must consist of an exclusive, continued, visible, notorious and hostile possession under a colorable claim of title. (*Dawson* v. *Watkins*, 2 Rob. 259; *Taylor's Devisees* v. *Burnsides*, 1 Gratt. 186; *Nowlin* v. *Reynolds*, 25 Gratt. 141; *Core* v. *Faupel*, 24 W. Va. 238.)

Second.—Actual possession, to constitute adversary possession, must be an *actual occupation* or else the use and enjoyment thereof by the act of ownership *equivalent* to such actual occupation. But no adversary possession can ever be acquired by any acts of ownership over the land, which fall short of such *actual occupation, use or enjoyment.* (*Taylor's Devisees* v. *Burnsides*, 1 Gratt. 166, syl. 4; *Overton's Heirs* v. *Davisson*, 1 Gratt. 812, syl. 8.)

Third.—Constructive possession, which may or may not be adversary possession, arises when one under color of title by patent, deed or other writing takes *actual possession* of a part of his land thus in law acquiring possession to the extent of his boundaries contained in his patent, deed or other writing. (*Lessees of Clark et al.* v. *Courtney et al.*, 5 Pet. 320.) This is

properly speaking *constructive* possession as distinguished from *actual* possession. It is however sometimes loosely spoken of as *actual* possession, because in many instances it operates just as though it was actual possession; but as in other instances it does not so operate, it ought to be carefully distinguished from actual possession, and the failure to distinguish between them has produced confusion and misunderstanding. This *constructive* possession has its origin in the maxim of the common law: "Possession of a part shall be construed as possession of the whole," which, so far as I know is everywhere recognized.

Fourth.—Constructive seizin is seizin in law, where there is no seizin in fact. Thus, when the State issues a patent to a person who never takes any sort of possession of the land granted to him, he has nevertheless *constructive seizin* of all the land in his grant, though some one else be at the time in actual possession of it; for this actual possession of land belonging to the State is not regarded as adverse possession, as the State can not be disseized. So also, when a deed is made of a tract of land, no part of which is in the adverse possession of any one else, the grantor has constructive seizin of the whole of the land granted. (*Clay* v. *White*, 1 Munf. 162; *Green* v. *Liter*, 8 Cranch R. 229; *Clarke's Lessees* v. *Courtney*, 5 Pet. 318, 356; *Langdon* v. *Potters*, 8 Mass. R. 15.) This proposition is universally admitted to be true. But constructive seizin as thus defined is some times confounded with constructive possession as above defined. It is of course a matter of no importance by what terms we designate these several conditions above defined, *actual possession*, *constructive possession* and *constructive seizin;* but as each of them is clearly and distinctly different from the others, it is unfortunate that they have frequently been confounded, because distinctive names have not been uniformly given to them. We in this opinion will take special care to avoid this confusion and will uniformly give to each its proper name according to the above definitions. In doing this I am aware that I may be giving a name to some one or more of them, which has not always been given by courts and judges; but I shall do so, because it is essential to keep them constantly distinguished the one from the other. Indeed while

these terms have not always been used with precision, yet the decisions have always recognized, that the conditions designated by them are themselves distinct and separate and have very different effects in determining the rights of parties, when questions of conflicting claims or adversary possession are to be determined.

To illustrate the real difference between these three conditions, we will suppose the State grants to a person a large tract of land, to which the State has good title. The patentee may take actual possession of the whole tract of land by enclosing and cultivating the whole of it. He has then actual possession of the whole tract of land; and he can not be disseized by any one else acquiring adversary possession thereof except by such person actually turning this patentee out of possession by force and taking actual possession of the land himself, claiming it as his own as by a subsequent grant to him by the State. Or such patentee instead of taking actual possession of the whole tract of land may take actual possession of a small part by enclosing and cultivating the same, but claiming title to the whole of it he has constructive possession of the whole; and as to such parts of it, as are not in his actual possession, he may be disseized by another without his using any force but by actually settling on a part of the land and enclosing and cultivating it and claiming title thereto, though in fact his title be not a good one, as for instance, when it is a subsequent patent from the State. The part so actually enclosed and cultivated by this junior patentee is in his adversary possession as against the senior patentee, the *constructive* possession of the senior patentee yielding to *actual* possession of the junior patentee. If we do not distinguish between these two sorts of possession but call them both *actual* possession, is it not obvious, that much confusion must necessarily be produced? for clearly, as shown by the above example, which all admit to be law, there is a marked difference between what I have called actual possession and what I have called constructive possession. It any one prefers different names for them I do not object; I only object to giving the same name to both.

If the senior patentee instead of taking possession of part of his land should take no actual possession of any part of

it, so that he had what we have called only *constructive* seizin of the whole of his tract of land, and the junior patentee, whose patent was entirely within the bounds of the senior patentee, took actual possession by enclosure and cultivation of a part of the land in his patent, he would nevertheless have constructive possession of the whole of the land included in his patent; and this constructive possession would as effectually be regarded as adversary possession of the whole as against the constructive seizin of the senior patentee, as if the junior patentee had actual possession of the whole. Then the constructive possession of the junior patentee would oust the senior patentee, though he had, before the junior patentee obtained his patent, constructive seizin of the whole of the land including all that covered by the junior patent. Thus a constructive seizin of the senior patentee would yield to the constructive possession of the junior patentee. This is undisputed law and shows the marked difference between what we have called constructive *seizin* and constructive possession. Yet these two have also frequently been called by judges and law-writers by the same name, constructive seizin, as I have called it, being often called constructive possession, I do not claim that the names I have adopted are peculiarly well chosen; but as the conditions are obviously different, I insist that if confusion and uncertainty are to be avoided, they should be known by different names. For these reasons I will use the phrases actual possession, constructive posession and constructive seizin throughout this opinion as having distinct meanings and according to the definitions I have given above, though in so doing I may use the phrases in a different sense from what they have been sometimes used by judges and law-writers.

We will now consider the case before us of an interlock between a senior patent or better title and a junior patent or worse title.

First. Where neither party ever took any actual possession under their respective patents or titles, when the senior patent or older and better title was first issued or obtained, the senior patentee or person holding the better title immediately on the issuing of his patent or obtaining his title

would, as we have seen, admittedly have *constructive* seizin of his whole tract of land including of course the whole of the land included in what became an interlock, when the junior patent was issued or worse title obtained. The junior patentee or holder of the worse title, when his junior patent was issued or when his worse title was obtained subsequently, would have constructive seizin of only such portion of sih land, as lay out of the interlock. For he could not have *constructive seizin* of the interlock, as it was already in the constructive seizin of the senior patentee or holder of the older and better title, and it is obviously an absurdity for two persons holding adverse titles to be both constructively seized of the same land. This proposition is obvious and is undisputed by any one. This may be expressed by saying that the *constructive seizin* of the junior patentee must yield to the constructive seizin of the *senior patentee* where there is an interlock.

Second. If the senior patentee never enters upon any part of the land patented to him and has no actual possession of any part of it either within or without the interlock, so that he has only a constructive seizin of his land patented to him including the interlock, and the junior patentee takes actual possession of a portion of the land patented to him outside of the interlock claiming title to the whole of his grant, so that he would have constructive possession of the whole of his grant including the interlock but for the fact that the senior patentee had constructive seizin of the land, when this *constructive possession* of the junior patentee arose, the constructive possession of the junior patentee arising from his actual possession of a part of his land outside of the interlock, extends only to all his lands lying outside of the interlock, and can not overcome the constructive seizin of the senior patentee to the whole of the interlock and thus work an ouster of him. This is expressly decided in *Koiner* v. *Rankins' heirs*, 11 Gratt. 420, point 3 of syl. and pages 427 and 428, and *Cline's heirs* v. *Catron*, 22 Gratt. 378, point 1 (II) of syl. and p. 392. These Virginia decisions are fully sustained by decisions elsewhere. (*Trimble* v. *Smith*, 4 Bibb 257; *Smith* v. *Mitchel*, 1 J. J. Marshall 208; *Pogue* v. *McKee*, 3 J. J. Marshall, 208; *Napier* v. *Simonson*, 10 Overton 448.)

The reasons, on which these decisions are based, are expressed in the opinion of the court in *Trimble* v. *Smith, supra*. The court say:

"The question presented by the agreed case is, whether the entry of settlement by the defendants upon that part of the land covered by their patent, which is not within the interference between the two patents, should be construed to give them posession of the land included within the interference. * * When there is no adverse possession, there can be no doubt that a man by an entry into a part of the tract may acquire possession of the whole provided he may lawfully enter upon the whole; but to construe entry into part to which he has a right to give him possession of another part to which he has no right, would be making an act which was right in itself tortuous by construction. This would be wholly unwaranted and in direct violation of the principles of law, which requires that where an act is done, which is susceptible of twofold construction, one of which is consistent with law and the other not, that the former should prevail. A distinction is taken and obviously for good reason between the case where an entry is to have the effect of vesting or divesting an estate, and the case where the estate is already in the person making the entry and the possession vacant. In the former case an entry into part, gives possession of that part only; but in the latter a general entry into part reduces the whole to actual possession. 'And therefore' (says Coke) 'if the lord entereth into part generally for a mortmain, or the feoffee for a condition broken, or a disseizin into a parcel generally, the entry shall not vest or divest in these or like cases, but for that parcel. But where a man disseized of divers parcels, and the freehold is cast by law upon the heir, and the possession in no man, then the entry into parcel generally seemeth to vest the actual possession in him in the whole. Co. lit. b.' Now as the entry of the defendants in this case upon the part of their tract not within the interference, if construed to give them possession of the land within the interference, would have the effect of divesting the plaintiff of his rights, it is clear that such a construction is contrary to the law as laid down by Coke. Indeed if such a construction should prevail, a party having right might be di-

vested of his right without any wrong being in *fact* done him or any possibility of knowing that any was intended to be done."

This reasoning seems to me conclusive. Different reasons for a like conclusion are given by Judge Baldwin in *Taylor's Devisees* v. *Burnsides*, 1 Gratt. 196, but to my mind they are far less satisfactory. But his reasoning was approved by Judge Lee in *Koiner* v. *Rankin's Heirs*, 11 Gratt. 428-9.

Third.—If the senior patentee never entered upon any part of his grant, so that he was only *constructively seized* of the land including the interlock, and the junior patentee has actual possession of a portion of the land lying within the interlock and thus *constructive* possession of the whole of the interlock as well as of the land in his grant outside of the interlock, then the mere *constructive seizin* of the senior patentee to the land in the interlock must yield to this *constructive possession* of the junior patentee to all the land in the interlock, and the result is an ouster of the senior patentee from all the land in the interlock as effectual as though the junior patentee had *actual seizin* of all the land in the interlock. This seems entirely just and right. The constructive possession of the junior patentee acquired by taking possession of a part of the land in the interlock ought in that case to override the mere constructive seizin of the senior patentee. This is abundantly sustained by all the Virginia authorities. (*Overton* v. *Davisson*, 1 Gratt. 223-4; *Koiner* v. *Rankin's Heirs*, 11 Gratt. 427–8; *Cline* v. *Catron*, 22 Gratt. 392. See also *Buford* v. *Cox*, 5 J. J. Marshall 587, 589, 590; *Calk* v. *Lynn's Heirs*, 1 A. K. Marshall 346; *West* v. *Price's Heirs*, 2 J. J. Marshall 280; *Fox* v. *Hinton*, 4 Bibb 529.)

It appears then, if the senior patentee has mere *constructive seizin* of the interlock, it can not be overcome so as to work his ouster by the constructive seizin of the interlock by the junior patentee nor by the constructive possession of the junior patentee of the interlock, if that constructive possession of the interlock arose from the junior patentee having actual possession of a portion of his grant outside of the interlock; but if the constructive possession of the junior patentee arose from the actual possession by him of a portion of his grant lying within the interlock, then the

constructive possession of the whole of the interlock by the junior patentee will be an ouster of the senior patentee, where he has only a *constructive seizin* of the interlock.

When the senior patentee has not a *constructive seizin* of the land in his grant, as in the three cases heretofore considered, but constructive possession of the whole of his land by holding *actual possession* of a portion of it, then in case of an interlock and the junior patentee holding *constructive possession* also of the whole of his grant by reason of his holding *actual possession* of some portions of it within his grant, this will give rise to four different cases:

First.—When the senior patentee holds actual possession of a portion of his grant within the interlock and thus has *constructive possession* of all the land within his grant, and the junior patentee has also actual possession of a portion of his land within the interlock and thus *constructive* possession of the land within his grant, the constructive possession of the junior patentee can not overcome the constructive possession of the senior patentee and work an ouster of the senior patentee of all the land in the interlock not in the actual possession of the senior patentee, though it would obviously work an ouster of the senior patentee of that portion of the land in the interlock, of which the junior patentee had the actual possession, but the ouster would be confined to the land actually occupied by the junior patentee and could not be extended beyond that to the whole of the land in the interlock. This seems to be an obvious and necessary result, as the *constructive* possession of the junior patentee could not oust the senior patentee of lands in his *constructive* possession, though the *actual possession* of the junior patentee to the extent of the land thus actually occupied would oust the senior patentee of lands, of which he had only a constructive possession. This proposition is universally admitted by all courts and judges. (*Overton* v. *Davisson*, 1 Gratt. 224; *Koiner* v. *Rankin's Heirs*, 11 Gratt. 420, 427–8; *Cline* v. *Catron*, 22 Gratt. 392.)

Second.—If the senior patentee is in the *actual possession* of a portion of the interlock and thus in *constructive possession* of the whole of his grant including the whole of the interlock, and the junior patentee is in *actual possession* of a portion of

his grant outside of the interlock and thus has *constructive possession* of the whole of his land, it is obvious, that the *constructive possession* of the junior patentee can not overcome the *constructive possession* of the senior prtentee. This is admitted by all and indeed, as we have seen, the *constructive possession* of the jurior patentee arising, as in the supposed case we are considering, according to the Virginia cases would not even overcome the *constructive seizin* of the interlock by the senior patentee, and of course it ceuld not evercome his *constructive possession* of the interlock arising from his actual possession of a part of the interlock. (*Koiner* v. *Rankin's Heirs*, 11 Gratt. 420, 427–8 and *Cline's Heirs* v. *Catron*, 22 Gratt. syl. 1, 2, p. 392, point 1 (II) of syl.)

Third.—If the senior patentee is in actual possession of a portion of his land outside of the interlock and thus in constructive possession of the whole of his grant including the whole of the interlock, and the junior patentee is also in possession of a portion of his grant outside of the interlock and thus in constructive possession of all his land, it is obvious, that the constructive possession of the junior patentee can not overcome the constructive possession of the senior patentee. This is admitted by all and is sustained by the authorties just referred to.

Fourth.—When the senior patentee has actual possession of some part of the grant outside of the interlock claiming title to the whole and thus has constructive possession of all the land included in his grant including all the land in the interlock, and the junior patentee enters upon and takes actual possession of a part of the land included in the interlock claiming title to all the land included in his grant and thus but for the senior patentee's constructive possession of all the land in the interlock would have constructive possession of all the land within his grant including all the land in the interlock not in his actual possession, it would seem clear upon principal, that the *constructive possession* by the junior patentee of all the land in his patent including all the land in the interlock, had there been no conflict with the senior patent, can not take effect so far as the land in the interlock not in his *actual possession* is concerned; and there is nothing which can serve to overcome the *constructive possession* of the senior patentee and work an

ouster of him from all the land in the interlock not in the actual possession of the junior patentee. In other words the constructive possession by the senior patentee can not be overcome by the subsequent constructive possession by the junior patentee. We have seen, that in all other cases the prior constructive possession of the senior patentee is always held to be superior to and to destroy what otherwise would have been a constructive possession of the whole land lying within the interlock; and I can see no good reason why there should be an exception to this otherwise universal rule. Indeed it strikes my mind as absurd to hold in any conceivable case, that, when the senior patentee or party having the better title has *constructive possession* of the whole of the interlock, he can be ousted therefrom by the mere constructive possession of all the lands in the interlock by the junior patentee. One having a good title to the land and the constructive possession thereof certainly ought in no case to be ousted therefrom by one having a worse title and claiming only constructive possession of the land. Two parties in the nature of things can not have constructive possession of the same land. And as the constructive possession claimed by one must necessarily yield to the constructive possession claimed by the other, it seems to me to be almost absurd to say, that the party, who in such conflict must yield, is the party who has the best title and also the first constructive possession of the land. How can he be called on to yield to one, who has a worse title, and who claims to have a *constructive* possession originating subsequent to the unquestionable constructive possession of the senior patentee.

Plain as this proposition seems to be, it has been called in question by distinguished judges. But there has been no decision, which I have seen in this State or elsewhere, which controverted this proposition, but on the contrary there are numerous decisions which sustain it; and while there is no decision in Virginia or West Virginia affirming or denying this proposition, there are elsewhere many decisions, which affirm it, and none I have seen, which lay down the opposite proposition.

Among the cases, which sustain this proposition, is *Green* v. *Liter*, 8 Cranch 229. The proposition which we have

above laid down as law, is distinctly held to be the law for the reasons assigned in the answer given by the court to the tenth question found on page 250. The question answered is to be found on page 231.

The next case in the same court on this point is *Lsssee of Clarke* v. *Courtney et al*, 5 Pet. 320. In that case the party claiming under a defective deed entered into and held the *actual possession* of a part of the interlock, and the party having the better title was in possession of a part of his land outside of the interlock. The syllabus on this proposition we have laid down is: "When a person enters into land under a deed or title, his possession is construed to be co-extensive with his deed or title, and though the deed or title may turn out defective or void, yet the true owner will be deemed to be disseized to the extent of such deed or title. This however is subject to some qualifications. For if the true owner be at the same time, in possession of a part of the land, claiming title to the whole, then his seizin extends by construction of law to all the land, which is not in the actual possession or occupancy by enclosure or otherwise of the party claiming under the defective deed or title."

Both these cases were from Kentucky; but they were decided on common law principles, no statute of the State of Kentucky touching the subject being referred to by the court; and these decisions are clearly in accord with the Kentucky decisions. (*Bodly, &c.* v. *Logan's Heirs*, 2 J. J. Marsh. 254; *Layton* v. *Galloway, &c.*, 4 Bibb 101.)

From the cases of *Fox* v. *Hinton*, 4 Bibb 559 and *Culk* v. *Lynn's Heirs*, 1 A. K. Marsh. 547 it appears, that if, before any possession is taken by the senior patentee, the junior patentee enters upon the interlock and takes actual possession of a part of it, his possession will be construed to extend to the limits of the interlock, and a subsequent occupation by the senior patentee of a portion of the land outside of the interlock will not give him constructive possession within the limits of the interlock, but it will still remain in the constructive possession of the junior patentee. But the reasoning in these cases shows, that, if the senior patentee had taken actual possession of a portion of his patent outside of the interlock, his possession would be regarded as *constructively* ex-

tending to the limits of his patent, if he so claimed, and would include the whole of the interlock as in his constructive possession; and if subsequently the junior patentee took actual possession of a part of the interlock, he could gain no constructive possession of the whole interlock, but his ouster of the senior patentee would be confined to the land in the actual enclosure or occupancy by him. These views correspond with the views I have above expressed.

In the case of *Burns* v. *Swift et al*, 2 Serg. & R. 439, the court say: "Where the surveys interfere the act of limitation has no operation against him, who has the best right, except his opponent takes *adverse* and *exclusive* possession. Where there is no interference, possession of a part is in law possession of the whole. And it is this maxim, of *possession of a part being possession of the whole*, which has led some persons into error, by applying it to the case of interfering surveys, to which from the nature of things, it is not applicable. In the case of *Ringold, lessee* v. *Cheney*, in the general court of Maryland, the principle which I have mentioned with regard to interfering surveys was expressly decided. (Hall's Am. Law Journal No. 1, p. 128.) I understood Chief Justice McKean and brother Yates have recognized the same principle in decisions at *Nisi Prius*, and, indeed, I have always considered the law as very clear."

I have found no decisions, which controvert these decisions in other States; but it has been claimed, that the proposition, which I have above laid down, though fairly deducible from the decided cases ought not to be regarded as law in Virginia or West Virginia because of a statute in force in both States which declares: "In a controversy affecting real estate possession of a part shall not be construed to be possession of the whole, where an actual adverse possession can be proved." (1 R. C. p. 510, sec. 9; Code of Virginia, ch. 135, sec. 19, p. 560; Code of West Virginia, ch. 90, sec. 19, p. 520.) But it seems to me obvious that this statute has no bearing on the proposition under consideration; that what would *be constructive possession* of an entire tract of land shall not prevail as against *actual adverse possession*. This was law prior to the passage of this act, as it was a part of the common law. But as some doubt as to whether

this was the law has been created by the frequent calling of constructive possession actual possession by judges and text-writers, the legislature properly enacted this statute simply re-affirming the common law and thereby removing the doubts created by the loose use of terms which I have shown was common then and is still not unusual. The legislature simply distinguishes clearly between *constructive possession* and *actual possession*, so as to avoid the confusion which had arisen from not properly distinguishing between them. The familiar speaking of *constructive possession* as though it was the same as *actual possession*, had rendered the common law as laid down in this statute obscure; and to clear up this obscurity was, it seems to me, the obvious and only object of this statute. Though there is no decision in Virginia or West Virginia opposed to the proposition, which I have last above laid down, yet Judge Baldwin in *Taylor's Devisees* v. *Burnsides*, 1 Gratt. 196–8 does controvert this position. It is true on page 197 he frankly admits, that the current of authorities support the position, which I have taken, and are opposed to the contrary proposition laid down by him, but he regards them as inapplicable because of the statute I have quoted above. But it seems to me obvious that this statute has no application or bearing on this proposition as I have shown. Judge Stanard in this case on page 209 expressly dissents from this view of Judge Baldwin. It has been supposed that Judge Lee concurred in these views of Judge Baldwin in his opinion in *Koiner* v. *Rankin's Heirs*, 11 Gratt. 428. He says: "In the case of *Taylor* v. *Burnsides*, Judge Baldwin in an able and luminous opinion delivered by him adverts to *this question* and expresses views with which the opinion here advanced is strictly coincident. And it would seem to be fully supported by numerous authorties." He then refers to numerous authorities, all of which have been referred to by me in this opinion. A careful examination of this opinion of Judge Lee will show, that *the question* on which Judge Baldwin delivered a luminous opinion, in which Judge Lee concurred, was not the question, we are now discussing but a very different question, that is, where the senior patentee had never had any actual possession of any part of his land and of course no constructive possession

of the interlock but only *constructive seizin* thereof resulting simply from the issuing of his patent, and the junior patentee took actual possession of his land outside of the interlock. In such case Judge Baldwin in *Taylor* v. *Burnsides*, 196, expressed his views and was of opinion, that the junior patentee gained no constructive possession of the land in the interlock. And with this view Judge Lee concurred and I also concur. And even if by *this question* Judge Lee meant the one we are now discussing, still he expresses no sort of concurrence in the views on this question but simply says, that the views he had advanced on other questions, for he had advanced none whatever on this, would be strictly coincident with the views of Judge Baldwin. All the authorities which Judge Lee cites as sustaining these views of Judge Baldwin we have quoted; and they do fully sustain all of Judge Baldwin's views except those on the proposition we are considering, upon which, as Judge Baldwin himself admits, they are in opposition to his views. I do not therefore consider that Judge Lee intended to say he concurred with Judge Baldwin on this proposition, or that he intended to express any opinion on the subject; and the authorities he cites are opposed, as we have seen, to the views of Judge Baldwin on this proposition, though they are strictly co-incident with all his other views as well as the views of Judge Lee, so far as he expressed any in his opinion. But on the point we are now discussing he did not say one word.

So too Judge Anderson has been supposed to have expressed his views in *Cline* v. *Catron*, 22 Grat., and that they were like those of Judge Baldwin. He says on pp. 392–393: "But if the junior patentee has an actual occupation and improvement of a part of the interlock, the actual possession of the junior patentee is co-extensive with the limits of his patent and is exclusive and adversary, and if continued uninterruptedly for the period of limitation defeats the elder patentee's right of entry or his better title as the case may be." He then cites the Virginia cases, which I have heretofore cited in Gratton.

Now this proposition is perfectly true and is fully sustained by the authorities cited, provided the senior patentee had no actual possession of any part of his lands, before the junior

patentee took possession of a part of the interlock. In such case the junior patentee's constructive possession does, as we have seen, "defeat the elder patentee's right of entry or his better title as the case may be." This I suppose is all that Judge Anderson meant; for he speaks of this principle being well settled. This is evidently the meaning attached to this rather loose language of Judge Anderson by professor Minor, who in his Institutes lays down this last proposition, as I have stated it, and as sustaining it refers to *Green* v. *Liter*, 8 Cranch 229 and the Virginia cases cited by Judge Anderson as well as the case of *Cline* v. *Catron*, 22 Grat. 392, which is the case, in which Judge Anderson expresses these views.

My conclusion therefore is, that when the senior patentee or party holding the better title takes actual possession of any part of his land claiming title to the whole of it, and subsequently the junior patentee or party holding the worse title takes actual adverse possession of any part of the interlock claiming title to the whole of it, he does not thereby oust the senior patentee or party holding the better title of any portion of the interlock, the whole of which he had constructive possession of excepting that portion in the enclosure or actual occupancy of the junior patentee. This conclusion is sustained both by reason and authority. It is true the legislature of West Virginia by an act passed March 8, 1879, ch. 61, p. 91 of Acts of 1879, changed this section 19 of ch. 90 of the Code of West Virginia and in so doing have changed the law, as I have laid it down above, and apparently adopted as law the views of Judge Baldwin, from which I have dissented. As this suit was instituted in April, 1874, it of course can not be affected by a statue-law passed five years afterwards.

It only remains then to apply the conclusion, which I have reached, to the facts in the case. And first we will observe, that the evidence shows, that the written title of the defendants is better than the written title of the plaintiff to all the land lying within the interlock; but if the plaintiff has by the evidence shown that he had actual or constructive possession, which was exclusive, continued, visible, notorious and hostile under colorable claim of title for a period of ten years of all the land included in the interlock, this would give him not only a conclusive defence to any action of ejectment for this

land, which might be brought against him, but the result would be so absolute as to confer on him a perfect title to all the land included in the interlock and would enable him to sustain an action of ejectment against the defendants, though they had a perfect written title to the land, unless they had such adversary possession for ten years before the institution of the suit. This is an undisputed proposition so fundamental as to need no reference to any authorities to sustain it. But as stating it substantially I may refer to Judge Baldwin's opinion in *Taylor* v. *Burnsides*, 1 Grat. 189; *Moody* v. *McKim*, 5 Munf. 374 and *Middleton* v. *Johns*, 4 Grat. 129, I have mentioned ten years as the time one must hold such adversary possession in order to give him a perfect title even against the party, who has a perfect written title, because by our statute the right of entry and the right to bring an action to recover land is barred by ten years after the time the right to make such entry or bring such action first accrued. (Code of W. Va. ch. 104, sec. 1, p. 546.)

The only question is: Did the plaintiff in this case have such an adversary possession of all the land contained in the interlock? If he had, he should recover all the land in the interlock not already in the possession of the defendant. If he did not have such adversary possession, then the judgment of the circuit court against him must be affirmed. Under the rules we have laid down as to the weight to be given to evidence on a demurrer to evidence the plaintiff must be regarded as having such adversary possession for more than ten years of the two parcels of land, one containing about eight acres and fifteen perches, and the other three fourths of an acre lying within the interlock. Of this he still has such possession, and his title thereto is, on the principles we have laid down, perfect. But as it was not when this suit was brought either in the possession of or claimed by the defendants the plaintiff is entitled to no judgment in his favor in reference to these two parcels of land in his actual possession but only to a verdict, if this actual adversary possession of these parts of the land in the interlock gave him constructive possession of all the land in the interlock, from the time he or those under whom he claimed took actual adversary possession thereof.

The defendants' title is derived by a regular chain of title, the links of which are all perfect, from a patent of the State of Virginia issued October 20, 1786; and this tract of land has been occupied in part by defendants and those under whom they claim continuously, from 1816 to this time, they residing upon it or portions of it all the time. During all this time they claimed title to the whole tract of land owned by them respectively, the boundaries of which included what is now the interlock, the greater portion of which is the subject of controversy in this suit. But they never had actual occupation of any portion of this land in this interlock till 1870, about four years before the institution of this suit. But since 1816 they have at all times had *constructive possession* of this interlock, unless as a legal consequence of the fact, that the plaintiff and those under whom he claimed took possession of these two small parcels of land enclosed within the interlock, they were ousted of their constructive possession of the portions of this interlock in controversy.

They were admittedly ousted of the possession of the two small parcels of land, which were enclosed and occupied by the plaintiff and those under whom he claims. Were they ousted from the residue of this interlock not actually occupied by the plaintiff or those under whom he claims by a *constructive possession* on their part of his portion of the interlock now in controversy in this suit? If the principles we have laid down are correct, they clearly were not so ousted. The interlock had no existence till 1836, when a grantor, under whom the plaintiff claims by a regular and perfect train of title conveyed to a grantee the tract of 140 acres, to the portion of which not interlocking with the land claimed by the defendants this grantor had a perfect title, but to the portion, which did interlock, he had no title, he in selling off this land having by mistake so run it off as to interlock with this grant of land by the State made October 20, 1786. Persons claiming under this grantee of 1836 took actual possession of a small portion of this interlock as early as 1847 and enclosed the two small portions, which we have named, more than ten years prior to 1870, when the defendants took actual possession of a part thereof for the first time. Upon this state of facts upon the principles, which we have laid down, the de-

fendants and those under whom they claim had constructive possession of this interlock continuously from 1816, till the plaintiff and those under whom he claims took actual possession of a portion of this interlock, a period exceeding thirty years. Having this constructive possession under a perfectly good title to the whole of this interlock for this great length of time they were only ousted therefrom by those under whom the plaintiff claims to the extent that they took *actual possession*, that is to say, to the extent of the two small enclosures still held by the plaintiff in his actual possession. But they were obviously not ousted of any other portion of this interlock or of the land in controversy in this suit.

The plaintiff and those under whom he claims could not gain constructive possession of this portion of the interlock in controversy, for the obvious reason that the persons, under whom the defendants claim, already had constructive possession under a perfectly good title and had had this possession for more than thirty years. I am therefore clearly of opinion that the plaintiff and those under whom he claims never had possession real or constructive of the land really in controversy in this suit, and that for that reason the circuit court of Harrison county properly rendered judgment in favor of the defendants on the demurrer to the evidence.

SNYDER, JUDGE:

I am compelled to dissent from so much of the preceding opinion as relates to the effect of an actual possession by a junior grantee of a part of an interlock, when the actual possession of the senior grantee is outside of the interlock. But before discussing this matter I will notice a point raised in the oral argument not considered in that opinion.

The deed, dated March 18, 1811, from Alexander Ireland and wife to James Warren conveyed 140 acres of land by metes and bounds, and the deed, dated November 30, 1836, from said Warren to George A. Sommerville, after giving the metes and bounds of the land therein conveyed, which are materially different from those in the first mentioned

deed, describes the land conveyed therein as "containing 140 acres, being the same tract of land which Alexander Ireland and wife by their deed, bearing date March 18, 1811, conveyed to the said James Warren. The difference in the metes and bounds as given in the latter deed from those given in the former deed therein referred to is what creates the interlock causing this controversy. The counsel for the defendant in error insists that inasmuch as it is apparent from the conveyances that this difference was a mere inadvertence or mistake, and as Warren had no intention to convey any more or different land than that which had been conveyed to him by said deed from Ireland and wife, the land in controversy did not pass by the latter deed to Sommerville and his claim thereto could not form the basis of an adverse possession. If this were all that appeared, perhaps the position contended might be sound. 3 Washb. on R. P. 367. But the record shows that this alleged mistake was discovered more than twenty years before this action was brought, and at that time the plaintiff had run the line which the jury found in their verdict, and thereafter, with full notice to the defendant, claimed under said deed all the land up to said line including all the land in controversy. The foundation of an adverse possession has no reference to the quality or goodness of the claimant's title. In fact the whole doctrine of such possession rests upon the assumption that the claimant's title is bad, at least inferior to some other title. The principal office of a claim or color of title is to define the boundaries of the adverse holding, and the authorities are conclusive that a claim to land under a conveyance however inadequate to carry the true title to such land, and however incompetent might have been the power of the grantor in such conveyance to pass the title to the subject thereof, yet a claim asserted under the provisions of such deed is strictly a color of title and one which will draw to the possession of the grantee the protection of the statute of limitations. *Core* v. *Faupel*, 24 W. Va. 238–48. The extent of such possession must in the nature of things depend in a great measure upon the intent of the adverse holder and the acquiescence of the real owner. And, therefore, where the adverse claimant, by an actual entry on, and occupancy of, the

land under a color and claim of title, thus openly manifests such intention the law presumes notice thereof to the owner, and if the owner with such notice and in the face of such hostile intent, by his non-action and acquiesence permits such claim and adverse possession to continue for the statutory period, the law transfers the title to such adverse occupant without regard to the quality of his title in its inception. I therefore conclude that this position of the defendant in error can not be sustained. *Kincheloe* v. *Tracewells*, 11 Gratt. 588.

As I do not admit the correctness of certain definitions given in the preceding opinion, it may be proper, before proceeding to consider the main question, for me to state what I understand to be the legal meaning and application of the terms employed in this opinion.

The term *seizin* is a word which we derive from the feudal law and meant in that law the completion of the feudal investiture. It was the possession with an intent on the part of him who had it to claim a freehold interest. This is generally termed *seizin in fact*. *Towle* v. *Ayer*, 8 N. H. 57; 1 Washb. R. P. 35.

Seizin in law is a right of immediate possession according to the nature of the estate. Cornyn's Dig.—*Seizin*. (A. 1, 2.) A grant from the commonwealth gives a right of entry, and therefore confers a seizin in law, but not an actual seizin or seizin in fact. *Speed* v. *Buford*, 3 Bibb 57. In the present state of the law in the United States seizin simply means ownership. Since lands may be conveyed in this country by grant, and the possession transferred without livery of seizin, the distinction between seizin in law and seizin in fact has ceased to exist and is not now known in practice. *Bush* v. *Bradley*, 4 Day 305; *Bates* v. *Norcross*, 14 Pick. 224.

Possession is the detention or enjoyment of a corporal thing which one holds or controls by himself or by another who keeps or controls it in his name, and is either *actual* or *constructive*. *Actual possession* exists where the thing is in the immediate control or occupancy of the party or his agent or tenant. *Taylor* v. *Burnsides*, 1 Gratt. 165.

Constructive possession, as applied to lands, is that which exists in contemplation of law, without actual personal en-

joyment or occupation. It is simply ownership with the right of immediate actual possession; and is, consequently, synonimous with the term *seizin* as now used in this country. *Hubbard* v. *Austin*, 11 Vt. 129; 2 Bla. Com. 116; *Storrs* v. *Frick*, 24 W. Va. 606.

A man can not physically occupy the whole of his lands at the same time or use every part of them to the same extent for the same purpose or in the same manner. His possession is necessarily more manifest and absolute as to some parts than it is as to the residue; therefore it is an established rule of law that the actual physical possession of a part gives to the person so in possession the actual possession of the whole tract or boundary covered by his title or color of title. Thus the true or apparent owner dwelling upon his farm by himself or his tenant, is as truly in the actual possession of his waters and unimproved woodland, however extensive they may be, as he is of his pastures, fields and gardens or that part of his land covered by his residence. The extent of his actual possession is co-extensive with and limited only by his title or color of title under which he claims. *Taylor* v. *Burnsides*, 1 Gratt. 165, 190; *Core* v. *Faupel*, 24 W. Va. 238, 244.

This rule is so absolute and controlling, that if the same owner or claimant has several co-terminous tracts under different claims of title, and he has actual possession of part of but one of such tracts, he will in law be regarded and treated as having the actual possession of the whole of each and all of said co-terminous tracts. *Overton* v. *Davisson*, 1 Grat. 216, 229.

Adverse possession is an actual, continued, visible and hostile possession under a claim or color of title. *Core* v. *Faupel*, *supra*.

From this definition as well as from necessity, there can be no such thing as *constructive* adverse possession. To bar the legal title there must be an actual entry on the land. And this intrusion must be accompanied by a claim or right to the land. The principle of the prescriptive bar is to treat him who has had the absolute dominion and enjoyment of the land for a given time as the true owner against all proofs to the contrary. It is this absolute dominion and enjoyment

which constitute actual possession. Constructive possession, as we have seen, is simply that possession or right of possession which the law ascribes to an owner not in actual possession. Therefore, seizin and constructive possession practically convey the same idea and they are frequently used in the same sense. But actual possession is radically different from either and means an actual occupancy with a claim of ownership. And an adverse possession can never be of the former class, but must in every case be of the latter, that is an actual possession.

In the preceding opinion the conclusion from which I dissent is the result, as I humbly conceive, of a misapplication of the phrase "constructive possession" and in assuming that there is a practical distinction in the law of this State between such possession and seizin. And it to a great extent ignores the plain and practical distinction between actual and constructive possession. It assumes that a person may be in the actual possession of one part and the constructive possession of another part of the same tract of land at one and the same time; that while he is in the actual possession of his improved land and that outside of his enclosure which he uses and enjoys in connection therewith by taking water, wood, coal and other natural products therefrom, he is only in the constructive possession of all the rest of the tract. This is a doctrine, it seems to me, which is not only not warranted by the legal definitions of these terms, but it is utterly impracticable. How is the extent of this actual possession outside of the improved land and enclosure to be determined? The occupant may cut timber and remove coal or take water from one portion today and from another portion two or five miles therefrom tomorrow, he may dig gensang on one part at one time and gather berries or other natural products at a different time and place. Are these parts, thus used and enjoyed more or less, in his actual possession? If so, what is the limit of his actual and where does his constructive possession begin? A mere reference to these and other difficulties that might be readily suggested demonstrates the impracticability of any such doctrine and the wisdom of the law which refuses to entertain it. According to the common law as well as the necessity of the subject a person can not be in the actual and constructive

possession of parts of the same land at the same time. The rule is universal, except when modified as hereinafter mentioned, that a person in the actual possession of a part of a tract of land under a title or color of title to the whole, is in the actual possession of the whole to the extent of his boundaries.

This rule in this State has two and only two qualifications. By the uniform decisions of the courts in this country and in England, where an adverse claimant, either with or without a color of title, makes an actual entry upon and occupies, under a claim of ownership, a part of the land so in the actual possession of the true owner and thereby dissiezes the owner, such owner will not be regarded as having either the actual or constructive possession of the land so actually occupied and held by such adverse claimant.

The other modification was made by the general assembly of Virginia by Statute passed as early as 1792. It, no doubt, regarding the common law rule as unsuited to the unimproved and unsettled condition of the lands of the State passed said statute which was continued in force up to the time this State was formed and it was then incorporated in our Code in the following words:

"In a controversy affecting real estate possession of part shall not be construed as possession of the whole, when an actual adverse possession can be proved." Sec. 9 ch. 90, Code p. 520.

One of the judges of the court of appeals of Virginia in the cases of *Taylor* v. *Burnsides*, 1 Grat. 165 and *Overton* v. *Davisson*, *Id.* 211, having dissented from the construction placed upon said statute by Judge Baldwin, who delivered the opinion of the court in those cases, and the third judge of the court of three judges sitting in those cases having expressed no opinion on the subject, the proposition now under consideration was made a *quære* in each of those cases, and the precise point never having since arisen in or been decided by that court or the Court of Appeals of this State, our legislature, in 1879, in order to remove the doubt raised by said *quære* and place this vexed question beyond further controversy in this State, passed an act which in effect affirms the law as stated by Judge Baldwin in the said cases. Ch. 61, Acts 1879, p. 91.

But as the case at bar arose prior to the year 1879, it must be decided without reference to the said act of 1879, except so far as may it be properly regarded as a legislative construction of the statute which it amended.

The whole history of the legislation of Virginia and of this State on the subject of land-titles shows a strong and manifest purpose to protect the rights of actual settlers and occupants of lands against the assertion of abandoned claims and neglected surveys held by adventurers and delinquent owners. It is a notorious and lamentable fact that as early as 1790 this State was shingled over with large grants containing not only thousands but often hundreds of thousands of acres, the same land frequently embraced in two or more of these grants, the owners neglecting to pay the taxes thereon or settle upon or improve them in any manner, but merely holding them for speculation to be resuscitated after years of neglect and apparent abandonment in the event they should be made valuable by the enterprise and industry of honest actual settlers claiming under titles believed to be good but which are often found to be junior grants. For a condensed review of the system of granting lands in the territory now covered by this State, the troubles it caused and the legislation adopted to remove its great evils and protect actual *bona fide* occupants and settlers, reference is here made to the opinion of this Court in *McClure* v. *Maitland*, 24 W. Va. 561.

The court of appeals of Virginia observing and applying, as I understand the decisions, these rules and general principles, have established beyond controversy the following propositions as the settled law of that and this State in cases where two grants conflict and occasion what is called an interlock:

First.—The elder grantee by the mere operation of his grant acquires at once constructive possession of all the land within his boundaries, although he has taken no actual possession of any part thereof. *Clay* v. *White*, 1 Munf. 162.

Second.—The junior grantee under his grant acquires a similar constructive possession of all the land embraced by his boundaries, except that portion within the interlock, the constructive possession of which had already vested in the elder grantee. *Clark* v. *Courtney*, 5 Pet. 318, 354.

Third.—Where the elder grantee is not in the actual possession of any portion of his land and the junior grantee enters and occupies a part of the interlock, claiming the whole within his boundary, he thereby ousts the elder grantee of his constructive possession and becomes actually possessed to the extent of his grant. *Koiner* v. *Rankin*, 11 Grat. 420-4. If the elder grantee is in the actual possession of any part of the interlock at the time of the entry thereon by the junior grantee, then the latter can gain no adversary possession beyond the limits of his mere enclosure without an actual ouster of the elder grantee from the whole of the land in the interlock. *Overton* v. *Davisson*, 1 Grat. 211; *Taylor* v. *Burnsides*, *Id.* 165.

This brings us to the proposition under discussion, stated as a *quære* in the two cases last cited as follows: "Whether the possession of the junior grantee will be limited to his enclosure, by the actual possession of the elder grantee of a part of the land embraced in his grant, not embraced within the limits of the grant to the junior grantee?

The third of the foregoing propositions proves conclusively the inaccurate use of the phrase *constructive possession* in the preceding opinion. The junior grantee, in that instance, having no title to the land in the interlock could not, under the rule stated in the second proposition, have constructive possession. To disseize the elder grantee of any part of the interlock the junior must have actual possession of such part. Adverse possession, as we have seen, must of necessity be actual. If, therefore, the possession of the junior grantee extends, as the law declares it does, beyond his enclosure, it can only do so because it is actual and not constructive. If it is not actual, all the authorities agree that he can not acquire title against the owner, because there can in the very nature of the thing be no constructive possession or seizin except by the owner. But the law as laid down in said third proposition, and fully sustained by the Virginia decisions, holds that the junior grantee is in the adverse and, therefore, necessarily, in the actual possession of all the land in the interlock although his enclosure, his *pedis positio*, may cover but a very small part of the interlock. This can not be true, if the possession of the junior grantee beyond his mere enclosure

is simply constructive, and can only be true when such possession both within and beyond his enclosure is actual; that is, his possession of his enclosure, while more manifest than is that of his woods and unimproved land outside of it and within the limits of his grant, still in legal effect his possession both within and beyond his enclosure is precisely the same, and is in law actual possession.

Proceeding directly to the proposition under enquiry. The elder grantee by his actual occupancy of a part of his grant is, under the common law rule before stated, in the actual possession of the whole grant including the interlock. His possession being thus actual, is equal in every respect to any actual possession which the junior could acquire by any possibility, and the elder, having the title as well as such actual possession, the junior could logically acquire no right by adverse possession even to such part of the interlock as he might enclose and of which he has the actual *pedis positio*. Two persons can not at the same time have the actual possession of the same land. The actual possession by the elder grantee as effectually excludes the junior grantee from the possession, in contemplation of law, of that part which he actually occupies and has enclosed as it does from that portion not so occupied and enclosed. This logical result of the common law rule has been, as before shown, so far modified by the decisions of the courts as to regard and treat the adverse claimant as in the possession of the land actually enclosed by him. And in my opinion this rule has been further modified by the statute of 1792, hereinbefore given as found in our Code of 1868.

This statute could not have been passed to protect merely the actual enclosure of the junior claimants, because that had been done by the decisions of the courts and had become the settled law of England and this country before the statute was enacted. Nor could it have been intended to protect the owner or *older grantee* against an adverse or *junior* claimant; for, the elder, having the title, was fully protected when in possession of any part of the *land in controversy* independently of the statute. Therefore, to give the statute any force or effect it must be held to embrace the case of an actual possession of the owner or elder grantee beyond, and

of an adverse or junior claimant within, the limits of the interlock of the conflicting grants, that is, of the land in controversy in the action. "The real estate in controversy" referred to in the statute is necessarily the land in the interlock, because the land outside of this whether within the elder or the junior grant is not in controversy; and the words "actual adverse possession," used by the statute just as necessarily and certainly refer to the possession of the junior claimant; for the word *adverse* if applied to the elder title would be meaningless, there being no such thing as an adverse possession by the true owner. The very term means, a possession adverse to the true owner, and as there can be but one title to the same land, such owner could not be an adverse claimant, unless it might be absurdly supposed that he could hold adversely to himself. The owner or elder grantee never holds adversely to a junoir claimant, who has no title but merely a color of title. If the owner is in possession at all, he is there as owner and by virtue of his title and not as an adverse claimant. This construction of the statute is not only reasonable and consistent with its language and in harmony with the legislative policy of the State, as before indicated, but in view of the settled law of England and this country prior to its enactment it is the only construction that can be made so as to give the statute any effect whatever as altering the common law as it then existed. It must be supposed the legislature intended to make some change in the existing law; for otherwise, we would have to hold that it has acted without any object or purpose, a thing under the settled rules of construction the courts are not permitted to do, if it can reasonably be avoided. I, therefore, conclude that the *quære* or proposition under discussion should be decided in the affirmative; that is, where the elder grantee is in actual possession of the land covered by his grant outside of the interlock and the adverse or junoir claimant is in the actual possession of a part of the land in the interlock claiming the whole, he will in contemplation of law and by force of the said statute be treated as being in the actual possession of the whole land embraced within his grant or color of title.

The foregoiug conclusion is fully sustained by the able and instructive opinion of Judge Baldwin in *Taylor* v. *Burnsides*,

1 Grat. 190. It is also sustained by the opinion of Judge Lee, as I understand it, in the case of *Koiner* v. *Rankin*, 11 Grat. 424, and by the decision of the court in *Cline* v. *Catron*, 22 Grat. 378, 392, though the question was not directly presented by the record in the two latter cases.

The conclusion above announced imposes no unreasonable hardship—its result is the same as it is in every case of the application of the statute of limitations. It simply requires that ordinary diligence which is necessary in any case to protect rights which may be lost by *laches* and negligence. But the hardship, if it can be so regarded, is fully counterbalanced and overcome by the necessities arising out of the extensive regions of wild and unimproved lands in this State which have been settled upon by *bona fide* holders under junior grants. These settlers could not be otherwise protected in their just rights.

The owner knows, or ought to know, the boundaries of his own land, and that his adversary has settled within them claiming and exercising dominion, control and ownership over the interlock. If under such circumstances he is quiescent and fails to assert his right to the interlock by action or entry thereon, he can not complain if he is barred by the statute of limitations. The junior claimant by his actual entry and occupancy on any part of the interlock puts himself in a position to be sued in ejectment or other form of action. But the senior grantee by confining his actual possession to his land outside, or even within the interlock, he having the title, does not subject himself to an action; and, consequently, unless the statute gives the junior claimant's possession effect to the extent of his claim and boundary, he can never acquire an adverse possession beyond his mere *pedis positio* or enclosure, and his color of title has no operation whatever, because he may hold his enclosure under a mere claim without any paper-title of any kind. *Kincheloe* v. *Tracewells*, 11 Grat. 587

The statutes of limitations are statutes of repose and are dictated by a wise policy founded upon the presumption against him who has unreasonably delayed the assertion of a right and in favor of him who has long exercised the rights and dominion of owner. They are not made for the protection of wrong-doers: and because they apply between hostile

pretensions and against the apparently better right, they are not in fact a protection to wrong-doers, but the instruments of giving effect to a necessary public policy; and they are more frequently in aid of the right than they are in support of anything that can be regarded as unjust or inequitable. To illustrate in the case of conflicting titles to land: The commonwealth issues a grant to one person for a large boundary of unimproved land, and a few days after issues another grant to another person, but by the mistake of the commonwealth, or its system of granting lands, a part of the land embraced in the first is also embraced in the second grant. Here neither grantee is at fault, both have acted in good faith and paid the same consideration for his land. The junior grantee settles upon and improves his land, then sells it to a third person for a full consideration, and thus sale after sale takes place, and then, perhaps after several generations, none of whom had any notice of the senior grant, a suit is brought by some one claiming under the senior grantee and on the trial it is shown that five or twenty miles from the land in controversy some tenant of the senior grantee, or those claiming under him, has had a bare possession by a cabin built on it and occupied or by the enclosure of a few acres, a possession taken and held, perhaps for no other purpose than to entrap *bona fide* or other adverse owners. If in such case the position I am opposing should prevail, the junior holders being actually on the interlock all this time and claiming, buying and selling the whole land embraced in their grant, would be confined to their *pedis positio* or mere enclosure, and the senior claimants, who acquiesed and slept all this while, would take all the residue of the land in controversy. Such a result would surely not be regarded as just and right. Nor would the rule for which I am contending if applied in such case protect a wrong-doer, or defeat the ends of justice and right.

From what has preceded it is apparent that the authorities cited and relied on in the preceding opinion have, in my view of the question, no bearing or application in this case. They are decisions based upon the common law made in States which have no statutes changing that law, as I have attempted to show is the case in Virginia and this State. I have con-

ceded the general law and the correctness of the decisions interpreting that law, but I hold that the statute and policy of the legislature in Virginia and this State have modified and so changed that law as to make it and the decisions based on it wholly inapplicable and foreign to the question considered in this opinion. Upon all other points and questions in this cause, I fully concur in the preceding opinion of Judge Green.

For the reasons aforesaid I am of opinion that the judgment of the circuit court should be reversed, and judgment entered here on the demurrer to evidence in favor of the plaintiff for the land found by the verdict of the jury, which is accordingly ordered.

Johnson, President, and Woods, Judge, concur in the foregoing opinion of Judge Snyder and also in so much of the preceding opinion of Judge Green as is not in conflict therewith.

REVERSED.

WHEELING.

MOORE v. SMITH *et al.*

Submitted June 17, 1885.—Decided July 9, 1885.

1. A court of equity has jurisdiction to enforce a vendor's lien on land for the purchase-money represented by a bond, though the bond has been lost, and though a copy of the deed can not be produced by the vendor, the plaintiff; and a bill properly alleging these facts should be sustained on demurrer, though there is with the bill no affidavit that the bond has been lost and could not be found on search, as these facts may be shown by proof or otherwise during the progress of the trial. (p. 382.)

2. A court of equity under the provisions of ch. 71, § 30, of Acts of 1882, (ch. 125, § 30 of Code), when it overrules a demurrer, can not enter a decree on the merits of the case set out in the bill, but it should give a rule upon the defendant to answer the bill in a specified time, and if the defendant fails to answer the bill on the day specified in the order, the court may then and not till then

enter a decree upon the merits of the case as stated in the bill. And though, when the demurrer is overruled, a rule be given to answer the bill but no day be specified in the order, the court can not enter a decree on the merits of the cause at a subsequent day of the term, if no answer be filed. (p. 383.)

3. This rule so required need not be served on the defendant, who is in court by having filed a demurrer, and therefore the rule is the equivalent of an order granting the defendant leave to file his answer before a specified day, and this is the form, in which the order is usually and properly entered. (p 384.)

GREEN, JUDGE, furnishes the following statement of the case:

At February rules 1883 B. F. Moore filed his bill in the circuit court of Ritchie county, in which he alleged, that some time in the spring of 1879 George G. Moore and Mattie his wife sold to Jacob S. Smith a tract of land in Ritchie county containing sixt-two acres, and that all the purchase money for said tract of land had been paid by said Smith except one deferred instalment of $150.00. A deed for said tract of land was made by said Moore and delivered to Smith, on May 1, 1879; and on the face of this deed a vendor's lien was expressly reserved to secure the payment of the residue of the unpaid purchase-money, that is, this note of $150.00. The plaintiff in this bill avers that he is now the owner of said note, which has been lost or mislaid, but he files with his bill as an exhibit a copy of said note. He avers that some little of this $150.00 has been paid as shown on the back of the note, on which are the endorsements, which are copied with said exhibit, there being now due thereon including interest $134.62, which remains unpaid, and which is a lien on said land. The defendant, Smith, has never had this deed recorded, and therefore the plaintiff can not file a copy thereof with his bill. The bill prays that Smith, Moore and his wife be made defendants, and that Smith be required to answer this bill and file with his answer said deed, in order that the court may inspect the same; that a decree for sale of said land may be made in enforcement of this lien and to pay of the balance of the purchase money due, and for general relief.

The exhibit filed with this bill is as follows:

"Three years after date I promise to pay unto George G.

Moore, his heirs and assigns the sum of $150.00 (one hundred and fifty dollars) (last part of the consideration money for a tract of sixty-two acres of land as shown by the deed dated May 1, 1879, from George Moore and wife to me) for value received with interest from date.

"Witness my hand and seal this first day of May, 1879.

"JACOB S. SMITH, [SEAL.]"

The endorsements on this bond were as follows:

"Received on the within in full amount of interest to date, May 1, 1882."

"Received on the within $23.00 by hand of David McIntyre this 16th day of May, 1882."

At March rules 1883 Moore filed an answer admitting the truth of all the allegations in the bill and particularly that he transferred this bond to the plaintiff for a valuable consideration, and that the plaintiff is entitled to the benefit of the vendor's lien on said tract of land. On June 19, 1883, Smith filed in open court a written demurrer to this bill, on which issue was joined, and on June 25, 1883, this demurrer was overruled, and on motion of the plaintiff a rule was awarded against the defendant, Smith, to file his answer together with the deed named in the bill. No answer having been filed, on July 10, 1883, a decree was rendered by the court, which recites, that the cause came on to be heard on the bill and exhibits therewith filed, upon the demurrer of Smith, which had been overruled, the answer of the defendant, Moore, and replication thereto, on process duly executed upon the defendants and upon the proceedings regularly had at rules, upon consideration whereof the court is of opinion, that the plaintiff is entitled to the relief prayed for, and that there was then due on said note, which was a vendor's lien on said tract of land, $134.86. It was therefore decreed that the plaintiff recover against the defendants $134.86 and the costs of the suit; and upon default in the payment thereof H. B. Showalter, who was appointed a special commissioner for the purpose, after advertising in a prescribed manner was directed to sell this tract of land at public auction at the front door of the court house of said county on certain specified terms, the commissioner to give a bond in the penalty of $500.00 conditioned according to law; and the defendant

Smith, was ordered to file a copy of the deed of said land to him within sixty days with the clerk of the court. The special commissioner was required to report his proceedings under the decree of the court. It is presumed he did so, though his report is not copied into the record before us, as it should have been, as there is copied into the record the following decree dated October 25, 1883:

"This cause came on this day to be further heard upon the papers formerly read and upon the report of sale of H. C. Showalter, special commissioner, from which report it appears that said commissioner under the former decree made sale of the land in the bill and proceedings to one David McIntyre for the sum of $475.00, and the said McIntyre failed to comply with the terms of his purchase. It is therefore ordered that said commissioner, H. C. Showalter, re-sell the land in the bill and proceedings mentioned and described, and that in making said sale the commissioner shall comply with the requirements of the former order and decree rendered in this cause.

"And it further appearing to the court that the defendant, J. S. Smith, has been duly served with process, but fails and refuses to answer the said bill and file his deed to said land as heretofore required, it is ordered that a rule be served upon him returnable on the first day of the next term of this court, requiring him, the said Smith, to answer said bill within thirty days after the entering of this order."

From these decrees Jacob S. Smith obtained an appeal and *supersedeas*.

T. E. Davis for appellant.

H. C. Showalter for appellee.

GREEN, JUDGE:

It will be observed from the statement of this case, that the record is in some respects defective; but, as no *certiorari* has been asked to bring up the omitted parts of the record, and there is enough before us to render a proper decree in this cause doing justice to all, we will at once decide it. The demurrer to the bill was properly overruled. The demurrer filed alleged as a cause of demurrer "that no proper exhibit

was filed with the bill showing that the note" (it should have been called bond) "was executed or that Moore, the plaintiff, was the owner of the same." This demurrer has so little basis as to induce the suspicion, that it was filed merely for delay. If a proper order had been made on the overruling of the demurrer requiring the defendant, Smith, to file his answer on a named day during the term of the court, no delay could have been produced by the filing of the demurrer. Authority can hardly be needed to show that this demurrer was groundless; but we refer to *Robinson* v. *Dix et al*, 18 W. Va. 529, syl. point 3, where this Court held: "A court of equity has jurisdiction to enforce a vendor's lien for the unpaid purchase-money represented by a bond though it has been lost; and while it's loss and that it can not be found on search may be properly stated in the bill and supported by affidavits; yet the failure to make such allegation would be no ground of demurrer, as it may afterwards be done on motion of the defendant, or these facts may be shown in the progress of the cause." In the case before us the bill would not have been demurrable, even if it had failed to state the loss of the bond.

It is equally obvious that the decree of July 10, 1883, must be overruled and annulled. The court at that time had no right to enter a decree settling the principles of the cause and decreeing a sale of the tract of land of the defendant, Smith; for the Code of West Virginia, ch. 125, § 30, provides: "If a demurrer be overruled, there shall be a rule upon the defendant to answer the bill. And if he fails to appear and answer the bill on the day specified in the order, the plaintiff shall be entitled to a decree against him for the relief prayed for therein." It seems clear therefore, that such a decree, as was entered, could not have been entered, when the demurrer was overruled, nor a few days afterwards during the term of the court, unless the court, after it overruled the demurrer to the bill, had ordered Smith to answer the bill on or before a specified day, and he had failed to do so. If this order had been made, and the day fixed for the answer to be filed had been prior to July 10, 1883, then a decree of the nature of the decree of that date might properly have been made. Otherwise it could not, and in no case should it have been made till after

the correction of certain obvious errors on its face, such as the defective recitals of how the cause came on to be heard. Instead of the decree being in favor of the plaintiff against the defendants it should have been, if a personal decree was rendered at all, against the defendant Smith only, and the bond required of the special commissioner of sale should have been a bond with good security to be approved by the clerk of the court.

The statute speaks of a rule upon the defendant to answer the bill at a specified day; but, as the defendant was in court by the filing of his demurrer, there was no necessity for such a rule to be served upon him. So that the rule in effect amounts only to an order authorizing him to file his answer on or before a day specified in the order. And the entry is usually and properly made in this form. All this seems clear enough on the face of the statute. But this Court has frequently decided, that under the provisions of sec. 30 of ch. 125 of the Code the court upon overruling a demurrer to a bill should order a rule against the defendant, requiring him to answer the bill within a fixed time, and that it is error to enter a decree against such defendant for the relief prayed in the bill on overruling a demurrer, but the court should order such rule, and an opportunity should be given to answer. *Peck* v. *Chambers*, 8 W. Va. 210; *Nichols* v. *Nichols*, *Id.* 174.

The said sec. 30 has been re-enacted in the Acts of 1882, ch. 71 sec. 30, p. 158. At the conclusion of the decree on the merits of the case of *Pecks* v. *Chambers*, *supra*, this order appears: "The defendant has leave to file his answer within ninety days from this date." The court commenting in that case on this order says: "The granting leave to file an answer within ninety days at the end of the decree of sale is not a compliance with the law upon the subject. The rule to answer should first have been made upon the defendant, and if he failed to answer at the day fixed by the rule, then the court would have been authorized to proceed to decree the relief prayed but not before without the consent of the defendant." 8 W. Va. 216; *Sutton* v. *Gatewood*, 6 Munf. 398.

The rule thus declared, it seems to me, is the only reasonable interpretation of the statute. It would certainly be no

benefit to the defendant to permit him to file his answer after the case had been decided against him and a decree entered on the merits. The object of the statute is to give him an opportunity to file his answer, before the cause is heard on its merits. After the decree an answer would be but an idle form, because it could avail nothing as against the decree already entered and a cause already decided upon its merits.

The cause under consideration is very similar to the one just referred to in respect to the question under discussion. The decree of June 25, 1883, upon overruling the demurrer awarded a rule against the appellant but fixed no time, within which he was required to answer. Then at the same term the court without any further reference to the rule and before answer filed entered a decree for the sale of the land. The sale was made, but the purchaser having failed to comply with its terms, a re-sale was ordered by decree of Otober 25, 1883, and by this decree another rule was awarded against the appellant to answer the bill. Thus after the decree of July 10, 1883, upon the merits the appellant was under no obligation to answer, because any answer filed after that time would have availed him nothing. The cause had already been decided. For the same reason the rule awarded by the decree of October 25, 1883, was too late to be of any service to him. It is the natural right of every defendant to be heard upon the merits of the suit against him, and unless he is in default according to the practice and rules of equity he can not be deprived of this right. In this cause the mode prescribed by the statute to place the appellant in default had not been complied with; consequently he was not in default, and it was error to grant the relief prayed by the bill without such compliance. The said decrees of July 10, 1883, and October 25, 1883, must, therefore, be reversed and the cause remanded for further proceedings in accordance with the principles announced in this opinion.

REVERSED. REMANDED.

WHEELING.

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MATHENEY v. SANDFORD.

Submitted June 22, 1885.—Decided July 9, 1885.

1. If it is claimed, that a deed conveying a tract of land in consideration of a debt due from the grantor to the grantee was though absolute in its form a mortgage on this tract of land to secure this debt; the circumstance, that this debt was already secured by a deed of trust executed by the grantor to a trustee conveying this identical tract of land to secure this debt and nothing else, is a circumstance so strongly indicating, that the transaction was, what it purported to be, a sale of the land and an absolute conveyance of it and not a mortgage to secure this debt, that it would take very strong parol evidence and strong circumstances to justify a court in regarding it as a mortgage; and in such a case as this the circumstance, that the grantor was hard pressed for money, and the grantee was a known money-lender, or that this debt (the price paid for the land) was considerably less than the value of the tract of land, and that the possession of the land remained with the grantor for several months after without any rent paid therefor or any even professedly reserved, would be entitled to but little weight to show, that this deed absolute on its face was a mortgage, as against the circumstance, that the parties could not have thought of the transaction as the giving of a lien or mortgage on this tract of land for this debt, as a lien on this land to secure this debt already existed. (p. 401.)

2. If the trustee in the deed of trust to secure this debt without the authority or knowledge of the creditor secured thereby receives from the grantor in said deed of trust a conveyance of this tract of land to this creditor for the amount of his debt secured by this deed of trust, and the trustee simply takes this absolute deed of this grantor and debtor but in no way induces him to execute it, but the creditor and grantee on being notified of the transaction assents to it, this deed is not voidable at the instance of the grantor because of the supposed agency of the trustee in this transaction, as, when the deed was executed, the trustee was not the agent of the grantee in the deed to purchase for him this tract of land. (p. 405.)

GREEN, JUDGE, furnishes the following statement of the case:

In August, 1881, Wm. H. Matheney of Jackson county in this State owned a tract of land of 259 acres in said county, on which he lived. He was very much embarrassed, and

there were liens on his land in the form of numerous judgments and a deed of trust, which amounted in the aggregate to $1,803.62. And as this tract of land was to be sold in a short time, Wm. H. Matheney applied to John A. Plumer of Marietta Ohio, who was an agent of John P. Sandford, who lives in the country in the State of Ohio a few miles from Marietta, for a loan of $2,000.00 to pay off these liens on his farm. Through John A. Palmer a loan of that amount was negotiated. John P. Sandford agreeing by his agent Palmer to loan to Matheney that amount, if it was secured by a deed of trust upon his farm in Jackson county West Virginia. The loan of the money to be for one year to bear interest at the rate eight *per cent. per annum*, that being the rate of interest, which a lender had a right to contract for in the State of Ohio. It was agreed, that Wm. H. Matheney should execute a negotiable note for this $2,000.00 to John P. Sandford or order payable one year after its date, and secure the payment of this negotiable note by a deed of trust on his said tract of land; and that John H. Riley an attorney residing in Marietta, Ohio, but who practiced law in Jackson county, West Virginia, should be the trustee. Wm. H. Matheney did not know personally John P. Sandford and did not see him pending this negotiation, it being carried on with Plumer acting as agent for Sandford. Neither did Riley have anything to do with the negotiation. He had prior to that in other transactions been the counsel of Matheney but had never been counsel for Sandford. The negotiable note for this $2,000.00 dated August 8, 1881, payable to the order of John P. Sandford with interest at the rate of eight *per cent. per annum* payable and negotiable at the First National Bank of Marietta, Ohio, was executed; and a deed of trust to secure it was executed and acknowledged by Matheney and his wife conveying this tract of 259 acres to John H. Riley as trustee. This deed of trust was dated August 11, 1881, and was recorded August 16, 1881. The money, $2,000.00 was placed by the attorney of John P. Sandford in the hands of Riley, the person, who, it had been agreed, was to be the trustee, on August 8, 1881. He according to the understanding of the parties out of it paid off all the liens then on this tract of land of Matheney's, and the

residue of it $173.88 was paid over by him to Wm. H. Matheney, after which Matheney's agent Riley had retained $100.00 as his fee in the transaction; and then this deed of trust was executed.

When this negotiable note became due, nothing was paid upon it. The interest not having been paid for nearly a year after the note became due, Sandford directed the trustee, Riley, to sell this land at public auction to pay the debt. The deed of trust was in the form provided by our statute, and, the terms of sale not being specified in it, the statute provides that it should be sold one-third for cash and the balance in two equal instalments payable in one and two years from the day of sale. (Acts of 1882, p. 440.) The trustee, Riley, thereupon advertised this tract of land for sale at public auction to the highest bidder at the court-house of Jackson county, West Virginia, on a certain day, which was during the session of the circuit court of said county. It does not appear on what day this sale was advertised, but it was some day in August, 1883. Before the day of sale, Sandford saw the trustee, and told him, that he did not want the land, but he might on the day of sale start the land as on his own bid for a sum sufficient to pay his debt and the costs of executing the trust. This would have been just about $2,400.00. The land when set up for sale was started at that price but was not cried off, but at the request of Matheney the sale was continued from time to time till August 17, 1883. During this time other bids were made, the last bid being probably $3,200.00; such bid was made by a responsible party. But the land was not knocked down at that bid, Matheney having executed a deed for it to John P. Sandford and thus put a stop to the sale.

The circumstances, under which this deed was made are as follows: Matheney being very unwilling, that his land should be sold at the prices bid for it had requested the trustee to continue the offer for sale by postponing the sale several times. In this way it had been postponed till August 16, 1883, at which time $3,200.00 was offered for it by a responsible party, and the trustee not believing he could get more refused, though urged by Matheney, to continue the sale beyond the next day. Several days prior to that Matheney had

told the trustee, that rather than have the land knocked down at that price, which was then being offered for it, he would convey it to John P. Sandford for the amount of his debt and the costs of executing the trust, the $2,400.00, which Sandford had offered for it. The trustee told him, that if he did that, he would loose several hundred dollars. But Matheney believing from the indulgence, which had been shown by Sandford in delaying the advertisement of the land for sale on two occasions at his request and on his statement, that if it were done, he, Matheney, believed he could raise the money, he would do better to convey it to Sandford, himself, hoping that if he could raise that amount in a short time, Sandford would re-sell him the land at that price, as he was satisfied Sandford did not want the land, but did want to get back the money he had loaned him, insisted that the land should be withdrawn from sale by the trustee, and that he would convey it directly to Sandford for $2,400.00. Riley, the trustee, finally assented to this, and on the evening of August 17, 1883, he drew a deed to be executed by Matheney and wife and acknowledged by them, which for the consideration of this debt, interest and costs, conveyed this tract of land of 259 acres to John P. Sandford, which deed was dated August 17, 1883, the last day to which he had said he would postpone this public sale. This deed he gave to Matheney, telling him to think over the matter and consult his son and others, and if the next day he was still desirous of doing this, he would withdraw the land from public sale publicly and take this deed. He told him distinctly then that he could not let the opportunity pass of enforcing the trust, unless it was distinctly understood, that this deed to Sandford was to be an absolute deed and not a mortgage. He was thus particular in having this understanding, because he had been required to enforce the trust, and knew, as Matheney did, that Sandford was not willing to wait for his money longer or to take the land at a higher price than $2,400.00, and because Matheney had once before insisted that an absolute deed for a small tract of land, which he had executed, was only a mortgage.

The next day Matheney wanted the sale postponed further saying he could raise the money to pay this debt from A. B.

Birch & Co., money-lenders in Marietta, Ohio. Believing that this could not be done Riley refused to further postpone the sale, and the tract of land was again set up and was being cried at $3,200.00, when Matheney again offered the deed from himself and wife to John P. Sandford, which Riley had drawn the day before, and which was now signed and duly acknowledged for recordation. Riley remembering the trouble he had had with Matheney at a former time declined accepting this deed and stopping the sale, till he called up two respectable men and explained the matter to them in the presence of Matheney, that he Matheney proposed by this deed to convey this tract of land to Sandford, it must be understood, that it was an unconditional and absolute deed without any promise of conveyance, and that it was not to be regarded as a mortgage. Matheney having considered the matter for a few minutes in the presence of one of these parties, to whom the matter had been fully explained, and who was a bidder on this land, it is believed, at the price of $3,000.00, delivered the deed to the trustee for Sandford, Sandford had no personal knowledge of this transaction till some days afterwards. When it was explained to him, he was satisfied and on August 21, 1883 this deed was admitted to record.

The trustee was right in supposing, that a further continuance or postponement of the public sale beyond August 17, 1883, in the hope that Matheney could raise cash to pay off the whole of his debt to Sandford would be an idle waste of time. Matheney completed his attempted arrangement with Birch & Co. within some two weeks after, on September 1, 1883; but instead of raising $2,400.00 if it had been carried out, he would have raised only $800.00 in cash, and $800.00 in twelve months and $800.00 in two years. Burke & Co. agreed to advance these sums, provided Sandford would convey to them this farm with the understanding that they were to pay him $800.00 in cash therefor $800.00 in one year with interest from date and $800.00 in two years with interest from date, and with this further understanding that if he would pay them in cash within sixty days $2,600.00 for this land, they would on the receipt of $2,600.00 convey to him this tract of land; but if he did not pay them this $2,600.00

in cash in sixty days, then the land was to be theirs, and they should thereafter be under no obligation to sell or convey it to Matheney. This proposition was made to Sandford on September 1, 1883 and he declined to accede to it; but he then told Matheney that he would do better by him than Burke & Co. proposed. That he would sell and convey the land to him for $2,500.00 in cash, if paid within thirty days, or $2,600.00 in cash, if paid to him in sixty days, which was the proposal of Burke & Co., or $2,700.00 in cash if paid to him in ninety days. But Matheney was never able to raise the money, and so this offer availed him nothing, except that he was left in possession of the land. While so in possession of it he cut about 300 cross-ties from off the land and sold them getting and keeping the proceeds of sale.

The option of Matheney to purchase this land from Sandford having expired December 1, 1883, and he not having exercised the option but cutting this timber from off the land and refusing to surrender possession of it, Sandford on May 10, 1874 brought an action of unlawful detainer against Matheney before E. A. Thomas a justice of said county of Jackson, W. Va. to recover from him the possession of this land. This action was tried May 30, 1884; and the justice rendered a judgment in favor of Sandford for the possession of the land. Matheney appealed from this judgment to the circuit court of Jackson; and the appeal was pending in that court, when this suit was instituted.

This tract of land was on August 17, 1883, worth intrinsically from $4,000.00 to $5,000.00. But it was a very unsalable farm being in a most miserable condition. A considerable part of it was then and had been for years grown up in bushes and briers. The fences and buildings were in a very delapidated condition, and around some of the fields the fencing was so bad as really to be in effect no fence though there were some rails around them. The condition of the farm was such, that its entire value would have been less than $100.00 *per annum*.

These being the facts on September 11, 1884, the judge of the circuit court of Jackson granted an injunction enjoining John P. Sandford from proceeding further in his said action of unlawful detainer against Wm. H. Matheney till the fur-

ther order of said court. The bill, on which said injunction was awarded, was filed by Wm. H. Matheney as plaintiff against John P. Sandford; and in it he states the matters above stated according to his view of them, which it is not regarded as important here to set out. It will suffice to say they differ in many respects from the real case as above stated. It will suffice here to state a small portion of the facts as represented in this bill. In it this language is used:

"Riley who was acting as agent and attorney for said Sandford assured and promised the plaintiff that said Sandford wanted nothing more than his money and the interest due thereon; and did not want said land. That he Sandford did not want said land sold at an inadequate price; and after such assurance on the part of said Sandford by his agent, attorney and trustee said Riley, the plaintiff was induced to execute and deliver to said Riley who was still acting as agent and attorney for said Sandford, a paper purporting to be a deed conveying said land to said Sandford in consideration of said debt which at that date to-wit, on August 17, 1883, amounted to only about $2,400.00 or less, the said land being then worth in cash $7,000.00. That said paper purporting to be a deed was executed and delivered under the belief on his part induced by the assurances and promises of said Riley acting as aforesaid for said Sandford, that upon the payment to the said Sandford of the said debt and interest; that the said Sandford would re-convey said land to him. * * * * * * * "Said bidders would or might have bought said land at said trust-sale at a fair price had not the plaintiff confided in said Sandford and his said attorney and prevented said sale by the execution of said paper. * * * The plaintiff with the full knowledge and consent of Sandford remained on said land, sowed a crop of wheat thereon in the year 1883, and also planted a crop in the spring of the present year 1884; that said Sandford treated the paper as a mortgage and agreed with the plaintiff that he should have three months thereafter in which to pay said debt and redeem said land."

The bill then sets out correctly the proceedings in the said writ of unlawful detainer brought against him by said Sandford and its pendency in the circuit court of Jackson and concludes with the following prayer:

"Plaintiff therefore prays that the said John P. Sandford be made defendant to this bill and be required to answer the several allegations on oath; that said defendant, his agents, attorneys and all others acting by, through or under him be restrained, inhibited and enjoined from proceeding further in said civil action against plaintiff and from in any manner interfering with plaintiff's possession of said land or his enjoyment of the same; that said writing purporting to be a deed be declared a mortgage; that the plaintiff be permitted to redeem said land and to have said writing cancelled and declared void upon the payment to said Stanford of said trust debt and its accrued interest, and that said Sandford be compelled to re-convey said land to plaintiff, and for general relief."

This bill was demurred to by the defendant, and he also filed his answer, which not stating all the facts above set out states them, so far as they are stated, substantially as above. The bill and answer were sworn to. Certain frivolous exceptions were filed to this answer not necessary to be noticed. There was a special replication filed, which sets out that the transactions named in the bill were usurious and asks a special issue in the premises as required by ch. 104 sec. 6 of Acts of 1882. This replication was also sworn to by the plaintiff. A motion was made in vacation to dissolve the injunction, which the court did not then act on, because an amended bill was tendered, which the court permitted to be filed. In this amended bill John H. Riley as well as said John P. Sandford were made defendants. This amended bill in addition to the allegations in the original bill says: "When said land was advertised about May, 1883, the sale was suspended by said Sandford, and when it was again offered for sale, said Sandford was not present to bid on the land or to buy it, and did not bid on the land or buy it at that time, because in fact the land was not sold at all by Riley, the trustee. The plaintiff says that as trustee said Riley was the agent of the plaintiff, as well as the agent of the defendant Sanford, and bound by law to exert the utmost fairness between them; that Sandford was not present to make a contract for the purchase of the land, and never did purchase the land, and that Riley, as joint agent of both, could not sell

to himself, and that while Riley was agent for the plaintiff and bound to protect his interests under said trust, he could not, without fraud against the interests of the plaintiff, procure or accept the conveyance of said land to Sandford for a grossly inadequate consideration, to-wit, less than one-half its value; that such a transaction on the part of said Riley, trustee, would savor so much of fraud as to make it against public policy and obnoxious to the fair judgment of a court of equity." * * * * The said Riley without the knowledge or consent of the plaintiff and against his interest, has acquired a personal interest to himself, the said Riley in the land in controversy; that while said Sandford has treated said paper as a mortgage he the said Riley ever since the date thereof has declared the same to be an absolute deed." * * * * "Plaintiff has, through friends willing to aid him, placed himself in a situation ready to pay off and discharge said debt to Sandford with interest."

The amended bill also charges it to be fraudulent in said Riley, when he had a bid of $3,200.00 to take for Sandford a deed for the land for $2,400.00. It also claims, that the transaction was usurious in this, that to make out the $2,400.00 stated in this deed to be the consideration, it would be necessary to include as a part of the costs, $76.00, the commission of the trustee, to no part of which was he entitled, the land not having been sold under the deed of trust, and to this extent the transaction was usurious. The amended bill also alleges "that not satisfied with the suit before the justice mentioned in the original bill the said Riley, as attorney for Sandford, served a declaration in ejectment on the plaintiff, demanding the said land, in the United States district court at Clarksburg; that the plaintiff was put to the pain, trouble and expense of going to that court, over one hundred miles distant, to learn that said Riley, after putting him to all that trouble and expense, had declined to docket the case."

The prayer of this amended bill is as follows:

"The plaintiff therefore prays that the defendants named in the caption be made defendants to this amended bill and required to answer the same on oath, and that the said paper filed as Exhibit 'A' with the bill may be held, adjudged and decreed to be a mortgage, and that the plaintiff may be

allowed to pay so much as he may be found justly to owe the said Sandford, and that the said usurious and unlawful interest shall be abated, and that said equity of redemption and the said legal title outstanding in the said Riley may be decreed to be reconveyed to the plaintiff; that this amendment may be allowed to be filed and to be made part of said original bill; and grant unto the plaintiff such other, further and general relief as the court may see fit to grant in the premises. And as in duty bound will ever pray." The amended bill was sworn to.

The defendants filed answers also sworn to, the contents of which it is not deemed necessary to state. They set out the facts of the case, as we have stated them above, more fully than they were set out in the answer to the original bill and set them out substantially correct though not as full as they have been hereinabove stated. They also denied all the statements in the amended bill not admitted in the statement set out in the answers. Numerous depositions were taken in some respects contradictory. But the admissions in the pleadings and exhibits filed with the bill, amended bill and answers proved the facts we have hereinbefore stated. And though the record occupies ninety-four pages, there was nothing else proven, which is regarded as material except that the ejectment suit named in the amended bill was brought but not docketed. It was proven that in the sum of $2,400.00 above mentioned the deed of August 17, 1883, was included about $47.00, the commission of the trustee, Riley. There is no proof that Matheney sowed wheat on this farm in the fall of 1883 or planted a crop of corn in the spring of 1884. All that is proven in reference to these matters is found in Matheney's deposition to the effect that "he has cultivated the land since he made the deed to Sandford." To what extent or how he does not state. His son in his deposition states, "he planted some potatoes on this farm in April 1884. Sandford he says saw him planting these potatoes, and his father Wm. H. Matheney was also present. He says he told Sandford he thought he would plant a considerable lot of potatoes if his father was not ousted. And he says Sandford said. He hoped his father would be able to save his land; all he wanted was his money." Sandford in his deposition says:

"I had several long talks with Matheney about the matter and he never at any time said or intimated that John H. Riley or any other person had made him any promises that he should have any time in which to redeem the land, or that the deed which he had made should be treated as a mortgage; but he freqdently said he had no claim in the land, but that it was all in his Sandford's hands. Prior to August 17, 1883, I had said to John H. Riley trustee, that I was willing to bid the amount of my debt and the costs on the land, but did not authorize him to waive the sale, give any time, or accept any mortgage. I was willing to accept the land for the debt but on no other terms. I accepted the deed of August 17, 1883, in discharge of his debt for the consideration stated therein. Up to August 17, 1883, I had not considered John H. Riley as my agent or attorney to transact my business for me. About the first of February, 1884, I employed said Riley to take steps to obtain possession of said lands, learning that said Matheney was committing waste, cutting and selling timber. I directed an action to be brought for the possession thereof. I did not at any time treat the deed of August 17, 1883, made to me as a mortgage or at the time so regard it. I did not at any time agree with said Matheney that he should have three months or any other time in which to redeem said land. Matheney never has complied with any proposition I made to him in reference to this land."

These statements of Sandford are supported by the other evidence and are believed to be true. From these and from the statement of the son of Matheney above given it would appear that when he was planting the potatoes he knew that Sandford had ordered proceedings to be instituted to oust Matheney from the possession of this land. It seems in the highest degree improbable that, after he had ordered these proceedings to be instituted, he stated anything to the son of the defendant and in the presence of his father, from which any just inference could be drawn, that Matheney was entitled to the possession of the land. No cultivation of this land after August 17, 1883, by Matheney or by any one under him is proven except the planting of some potatoes made after he knew a proceeding was about to be instituted by Sandford to get possession of the land. The statement in

this amended bill, that the "Plaintiff has through friends willing to aid him placed himself in a situation ready to pay off and discharge the said debt to Sandford with interest," is proven to be utterly false. The only persons, who have been willing to advance him any money at any time since August 17, 1883, were A. B. Burke & Co., who were shortly after August 17, 1883, willing to advance him or for his use about enough money to pay off one third of his indebtedness to Sandford, provided he would comply with certain very hard terms, which we have stated, and which he could not comply with. No other friends (if they could be called friends) ever offered him any assistance; and he never had the means of paying off this debt to Sandford and never did pay one cent upon it.

These being substantially all the facts proven in this case, the circuit court of Jackson on March 10, 1885 made the following final decree:

"This cause came on again this day to be finally heard upon the plaintiff's original and amended bills, and the answers thereto, respectively, by the defendants, with plaintiff's general replications to the same, upon the depositions duly taken and filed in the cause by both plaintiff and defendants, and the papers filed with said depositions as exhibits, and upon all the exhibits filed as part of the pleadings herein, upon the former orders and proceedings heretofore made and had in this cause, and was argued by counsel for plaintiff and defendants. Upon mature consideration of all which, the court is of opinion, from an inspection of the pleadings and proofs in the cause, that the charge of fraud made by the plaintiff in his bill and amended bill against the said Riley, trustee, touching the alleged sale and transfer of the land in the bill and proceedings mentioned and described, is not sustained, and that in that respect the plaintiff has not shown himself entitled to any relief; and that the paper writing, Ex. "A," with the bill, was not nor should the same be treated as a mortgage; but the court is further of opinion, from a careful examination of the record in this cause, that at the time the alleged sale and transfer of the said land from plaintiff to the defendant Sandford was made, the said Riley sustained such a fiduciary relation to the said plaintiff and to the subject-matter of said

alleged sale and transfer, that he could not legally become the purchaser, or act in the purchase of said property in the manner set out in the said record for his co-defendant; and the court is further of opinion that said alleged sale and transfer, being of the nature and character aforesaid, the same may be avoided at the instance of the plaintiff, and he, the said plaintiff, so desiring it, the court doth adjudge, order and decree that the paper-writing, bearing date of August 17, 1883, purporting on its face to be a deed from the plaintiff, W. H. Matheney and Druzilla Matheney, his wife, to the defendant, John P. Sandford, an attested copy of which is filed with the bill as exhibit "A," be and the same is hereby set aside and annulled and held for naught as if the same had never been executed; and the court doth further ascertain that the said paper-writing operates to pass no title from the said plaintiff to the said defendant Sandford, or to any other person; and the court doth further ascertain that the motion heretofore made by the defendants to dissolve the injunction awarded in this cause ought to be overruled and disallowed at this time, and doth so adjudge, order and decree; and it seeming to the court that the defendant Sandford ought not to proceed further in his action of unlawful entry and detainer against the said Matheney for the recovery of the possession of the land in controversy in this suit, it is further adjudged, ordered and decreed that the said John P. Sandford be and he is hereby perpetually enjoined from any further proceedings in the said action of unlawful entry and detainer as prayed for in plaintiff's bill. It is further adjudged, ordered and decreed that the plaintiff do recover from the defendant Sandford his costs by him about the prosecution of his said suit in this behalf expended, including a statutory allowance of $20.00 to the plaintiff, and in default of his paying the same within thirty days from the rising of this court, then a common law execution may issue therefor at the plaintiff's election; but nothing herein contained shall be taken or construed as in any manner affecting the rights and interests, either legal or equitable, of the parties to this suit, or any of them, under and by virtue of the deed of trust mentioned in the pleadings in this cause, executed by the plaintiff and his wife to John H. Riley, trustee, bearing date of August 11, 1881, an attested copy of which

is filed as exhibit "B" with the plaintiff's bill, but the defendant Sandford is left at liberty to enforce said deed of trust in such manner as he may be best advised; and there being nothing further to be done in this cause, the same is dismissed and stricken from the docket."

From this decree John P. Sandford has obtained an appeal.

J. H. Riley for appellant.

C. L. Brown for appellee.

GREEN, JUDGE:

The first question arising on the record is: Was the deed of August 17, 1883, executed by Wm. H. Matheney and wife to John P. Sandford conveying a tract of land in Jackson county, West Virginia in consideration of a debt due from the grantor to the grantee, amounting principle, interest and costs to about $2,400.00 though absolute on its face really and in fact a mortagage to secure this debt? This Court has decided that "if the proof offered to establish, that a deed absolute on its face was intended to secure a loan of money and was therefore a mortgage, consists only of the parol declarations of the parties, such proof in order to prevail must be clear and strong, if it be unaided by proof of the situation and circumstances of the parties, and their conduct prior to, at the time of or after the execution of the deed. The following circumstances and facts have great weight in leading a court to the conclusion, that a deed absolute on its face is merely a mortgage: First, that the grantor was hard pressed for money, and that the grantee was a known money-lender; second, that the actual execution of the deed was procured by a negotiation for a loan of money by the grantee to the grantor; third, that the parties did not apparently consider or contemplate the quantity or value of the land; fourth, that the price professedly given for the land on the face of the deed was grossly inadequate; fifth, that the possession of the land has remained with the grantor, whether rent be nominally reserved or not; and if no rent is even professedly reserved this last circumstance is entitled to great weight." See *Vandergilder* v. *Hoffman*, 22 W. Va. 2, syl. point 7; *Davis, Committee* v. *Deming*, 12 W. Va. 281;

Dubois et al v. *Lawrence et al*, 16 W. Va. 443; *Klinck* v. *Price*, 4 W. Va. 4.

It was also decided in *Vandergilder* v. *Hoffman*, that "if upon the parol evidence it is doubtful, whether the conveyance should be regarded by a court of equity as an absolute deed or a mortgage to secure a lien, the courts incline to hold it to be a mortgage." If in the case before us we look to the parol evidence, "it is not doubtful whether this conveyance was intended by the parties as an absolute deed or mortgage." The evidence distinctly shows, that, when this deed was delivered, it was clearly understood by the grantor, that it was to be regarded as an absolute deed and not as a mortgage, and it was distinctly understood, that this deed would not be received, unless it was delivered and to be regarded by the parties as an absolute deed. It is true, that if the court could see from the circumstances surrounding the parties, when the deed was executed, that the real transaction was a loan of money by the grantee to the grantor or an agreement on his part to postpone the enforcement of his debt, if it should be secured by a lien on the grantor's land, then despite the form of the deed and despite the fact, that witnesses were called to prove that it was delivered as an absolute deed and not as a mortgage, it would nevertheless be declared a mortgage by the courts. For, if the circumstances show, that the transaction is such, as is above described, it would establish an equity in the grantor superior not only to the terms of the deed but to the distinct understanding; for it being shown by these circumstances that the transaction was really a mortgage, it is against the policy of the law to allow such mortgage to be irredeemable, though it be ever so distinctly understood by the parties that it should be irredeemable; just as it is against the policy of the law to allow the creation of inalienable estates; and such estates can not therefore be created by any terms however clearly expressed in the deed, and though the parol proof be ever so distinct at the time the deed was delivered, that this was the express purpose and understanding of the parties. This is a necessary conclusion from what is said in *Vandergilder* v. *Hoffman*, 22 W. Va. 16; and by Field, judge, in *Pierce* v. *Robinson*, 13 Cal. 116.

But the circumstances surrounding the parties, when this deed of August 17, 1883 was made, show beyond all controversy or dispute, that the real transaction was not and could not have been a loan and was not and could not have been an agreement or understanding express or implied on the part of the grantee, that he would postpone the enforcement of the debt, if the grantor would secure it by a lien on his land. There is no pretence, that any money was loaned by Sandford to Matheney in August, 1883, or that there was at that time any application or negotiation between the parties in reference to any loan. Nor had there been any proposition for such loan or any such loan made by these parties for more than two years before this deed of August 17, 1883, was executed. The first and second circumstances named in the seventh point of the syllabus in *Vandergilder* v. *Hoffman* do not exist in this case. It is absolutely immaterial whether Sandford was or was not a known money-lender, as the actual execution of this deed was not preceeded by any negotiations for a loan by the grantee to the grantor. No such negotiation had taken place between the parties for more than two years. It is equally obvious from the circumstances admitted as surrounding the parties, when this deed was executed, that the real transaction was not and could not possibly have been an agreement or understanding express or implied that Sandford would postpone the enforcement of his debt, which Matheney had owed him for a year without the payment of a cent of principal or interest, provided Matheney would give him a lien on his land. The admitted fact was, that, when the debt was incurred, about two years before the date of this deed, Matheney had secured this debt, the only one he owed Sandford, by giving him a lien on this identical tract of land. He had given this lien in the form most desirable, a form in which the land could be sold and the proceeds applied to the payment of the debt without applying to any court and upon the mere request of Sandford. Matheney's wife had united in this lien, so as to convey her right of dower. The form in which this lien was given, a deed of trust, was far preferable, so far as Sandford was concerned, to a mortgage or any other form of lien; for any other form of lien would have required Sandford to institute a suit in equity before he could

subject the land to the payment of his debt; while under his deed of trust he could at any time require the trustee to sell after advertising the tract of land for sale. And on August 17, 1883, when this deed was made, this advertisement had been made, and Sandford could have had this tract of land without any delay sold and the proceeds applied to the payment of his debt, or he could, if he had chosen, have had the sale postponed. Under these circumstances it seems impossible to conceive, that there could have been an understanding, expressed or implied, that Sandford would postpone the enforcement of his debt, if Matheney would give him a mortgage on this tract of land. Of what possible use could the mortgage be to Sandford? Why should he desire to substitute a form of security on this tract of land, which he could only enforce by a suit in equity, for a form of security, which he already had, which he could enforce at any time at his pleasure, which he could have enforced, if he chose, that very day. It would be almost impossible to induce one by any parol proof to believe, that Sandford could have done an act so entirely senseless. The parol proof of those who witnessed the delivery of the deed, is clear and emphatic, that he did not do the foolish thing of taking a mortgage in lieu of a deed of trust covering the same property, which he could have enforced at any time, even on that day. But such proof was under the circumstances entirely unnecessary. The court could not under these circumstances consider a deed absolute on its face as a mortgage.

Under such circumstances the fact, that the grantor in this deed was hard pressed for money, or that the grantee had permitted the possession of the land to remain with the grantor, whether rent was reserved for the land or not, would be utterly insignificant. In this particular case the fact, that he remained in possession of the land, is accounted for by the fact, that some two weeks after this deed was executed to Sandford, he gave to Matheney an option to purchase this land within ninety days. When he did not then surrender the land, within less than three months he employed a lawyer to institute proceedings to oust him. How utterly vain is it under the circumstances to attempt to prove, that Sandford ever regarded this deed as a mortgage. There can not be a

doubt, that neither he nor Matheney ever so regarded it. This deed beyond controversy was not only intended and regarded by both parties always as an absolute deed and not as a mortgage, but the transaction, out of which it arose, demonstrates that it really was not a mortgage in fact, which the parties were endeavoring to conceal by putting the deed in the form of an absolute deed.

The circuit court was therefore clearly right, when in its decree of March 10, 1885, it declared, that this deed from Matheney and wife to Sandford was not a mortgage. But it seems to me the circuit court erred, when it expressed the opinion "from a careful examination of the record in this cause, that at the time when the alleged sale and transfer of the land from the plaintiff to defendant Sandford was made, said Riley sustained such a fiduciary relation to the said plaintiff, and to the subject-matter of said alleged sale and transfer, that he could not legally become the purchaser, or act in the purchase of said property in the manner set out in the said record for his co-defendant, and that this sale and transfer may therefore be avoided at the instance of the plaintiff." The decree on these grounds at the request of the plaintiff set aside and annulled this deed, and the injunction awarded against Sandford for thus proceeding on the common law side of the court to recover possession in this court was perpetuated, and the costs of this suit were decreed against said Sandford. I can see no just grounds for these conclusions or for these portions of said decree. It assumes justly, that Sandford, though he had a deed of trust on this land, had a perfect right to purchase it of Matheney, but that in making this purchase Riley, the trustee, could not legally act as his agent. Is this sound law, or has the court below taken a correct view of the facts?

The counsel for the appellant insists to use his own language that: "There is a stubborn rule of equity founded upon the most solid reasoning and supported by public policy, that a trustee can not become a purchaser of the trust-estate. He can not be at once vendor and vendee. He can not represent in himself two opposite and conflicting interests. As vendor he must desire to sell as high, and as purchaser to buy as low, as possible; and the law has wisely

prohibited any person from assuming such dangerous and incompatable characters." A large number of authorities are cited to sustain this position. And to the cases, which counsel cites, I would add *Newcombs et al.* v. *Brooks et al.* 16 W. Va. 32, syl. points 1 and 2. In this case the Court went still further and held:

"First.—A person who occupies any fiduciary relation to another, is bound not to exercise it for his own benefit and to the prejudice of the party, to whom he stands in such relation, any of the powers or rights or any knowledge or advantage of any description, which he derives from such confidential relation."

"Second.—A purchase by a fiduciary, while actually holding a fiduciary relation of the trust property either of himself, or of the party to whom he holds such fiduciary relation, is voidable at the option of the party to whom he stands in such relation, although the fiduciary may have given an adequate price for the property and gained no advantage whatever."

It is true the amended bill charged "that the said Riley without the knowledge and consent of the plaintiff and against his interest has acquired a personal interest to himself the said Riley in the land in controversy." But this allegation is denied and there is not in the record one particle of evidence to sustain it. Had it been true, that the trustee, Riley, had acquired any interest in the land conveyed by Matheney to Sandford, August 17, 1885, by this conveyance, and especially if he had had a secret interest in this purchase unknown to the grantor, Matheney, as is intimated by this charge in the bill, then there could be no doubt, but that on the authority of *Newcombs et al.* v. *Brooks et al.* this deed could properly be set aside by the court below at the option of Matheney the grantor. But as he had no interest whatever in the purchase of the land, and as in the sale and conveyance of August 17, 1885, he was neither vendor nor vendee, neither the law as laid down by the counsel above quoted nor the law as laid down in *Newcombs et al.* v. *Brooks et al.* is applicable to the case before us.

But it is insisted by the counsel of the appellant, that, where a person because of his being a trustee cannot purchase

the estate himself even from his *cestui que trust*, he can not buy it as the agent of any other person; and to sustain this position he refers to *Michael* v. *Good*, 4 How. 503; *Ex parte Bennet*, 10 Ves. 381; *Coles* v. *Trecothich*, 9 Ves. 325; 3 Waite's Actions and Defences 467; *North Baltimore Building Association* v. *Caldwell*, 25 Md. 420; *Beeson* v. *Beeson*, 9 Bens. Stat. (Barr) 279; *Terwilliger* v. *Brown*, 39 Barb. 1; Same 44 N. Y. 237. I have examined these authorities, so far as they are accessible to me. And while some of them do not properly bear on the subject, and I can not say, that it would be proper to deduce this doctrine from them, yet certainly some of them give strong countenance to this doctrine; and very strong reasons may be given in support of it. I am not, with the opportunities I now have, willing to lay down this rule so broadly, or to say that there should be no exceptions to it; but I do not find it necessary to determine definitely the law with reference to this subject, because in my judgment the question does not arise in this case. I may for argument's sake admit, that no trustee, who has authority conferred on him to sell property, can properly buy such property for himself, nor can he while such trustee acting as the agent of any other person purchase this trust-property of the *cestui que trust* or person who appointed him trustee to sell such property. If this be law, it is inapplicable to the facts proven in this case. Sandford had conferred on Riley no authority whatever in reference to the purchase of this land excepting the simple authority to set it up at the public sale to be made by Riley at a sum sufficient to pay his debt, interest and the costs of executing the trust, which sum would have been about $2,400.00. Riley accordingly set the land up at that price some time prior to August 17, 1883; and the public sale at the solicitation of Matheney, the debtor, was continued from time to time till August 16, 1883, at which time there was bid for said tract of land by a responsible bidder $3,000.00. The power therefore conferred on Riley to act as agent for Sandford (if it is properly to be regarded as a power to act as agent) had ceased to have any existence prior to August 16, 1883, having ceased to have any existence after a bid had been made at the public sale of a larger amount than $2,400.00, Sandford's bid. So that on August 17, when the

deed the subject of controversy was executed, Riley, the trustee, was not the agent of Sandford to purchase this land at the public sale or otherwise. There is no pretence that he ever had any authority from Sandford to purchase this land for him of Matheney. When therefore he drew the deed on August 16, 1883, from Matheney and wife conveying this land in consideration of this debt, interest and costs amounting to about $2,400.00 to Sandford, he was acting solely as the agent of Matheney and at his request. Sandford not having till some days afterwards any knowledge that such purchase was contemplated, when this deed was executed by Matheney and wife and handed to Riley the trustee the next day, he was not the agent of Sandford to accept this deed, Sandford never having authorized him to accept this or any other deed from Mtaheney, and not in fact knowing that Matheney contemplated making such deed. Of course this deed was totally inoperative, till it was assented to by Sandford several days afterwards. Riley the trustee with the approval of Matheney but without the knowledge of Sandford, who was not there, when this deed was handed to Riley by Matheney, withdrew the property from sale publicly believing that Sandford would be satisfied with this deed. His only reason for so thinking was the fact that Sandford had authorized him to set up this land at his bid of $2,400.00. From that he concluded that Sandford would be willing to take a deed from Matheney conveying the land to him for this amount to be applied in satisfaction of his debt. It seems in this he was right, as when this transaction was made known to Sandford a few days afterwards, he assented to it. He seems to have preferred to take the land at that price rather than to get only about one third of his debt and wait for the balance for one and two years, which would have been the result, if he had declined to accept this deed. On this state of facts there is no propriety in saying, that this land was purchased of Matheney by Riley, the trustee, acting as agent for Sandford; and therefore the rule of law, which as a matter of public policy according to the views of the attorney for the appellant forbids a trustee to act as agent for any one in purchasing the trust-property of the *cestui que trust*, has no application to the facts in this case.

A number of matters have been argued by the counsel for the appellee and many authorities cited which seem to me to be entirely foreign to this cause. For instance, it is contended, that the statute-law of Ohio, which shows that there was no usury in the promissory note executed by Matheney to Sandford and secured by the deed of trust on his tract was not properly proven—and many authorities were cited to sustain that position. In this State the court takes judicial notice of the statutory and of other laws of all other States or countries by express statutory-law. (Sec. 4 of ch. 13 of Code.) Of course it was entirely unnecessary to prove in this cause the law of Ohio whether statutory or otherwise. The courts in this State know the Ohio law without any proof.

The deed of August 17, 1883 recites the consideration therefor as "a debt due from the parties of the first part to the party of the second part, amounting principal, interest and costs to about $2,400.00." It is insisted that excluding all commissions to the trustee it only amounted to $2,345.35. This is claimed to have been a great wrong inflicted on the plaintiff Matheney by Riley the trustee. Now the consideration of this deed was "the debt, interest and costs due from Matheney to Sandford" and not $2,400.00; and Matheney suffered no wrong, if the supposed amount of this debt, interest and costs as stated in the deed was erroneous. The acceptance of this deed by Sandford was a satisfaction in full of this debt, interest and costs, and this is all it would have been if the supposed amount, which should have been stated, was, as plaintiff's counsel claimed, $2,345.35.

It is claimed too, that Riley, trustee, violated his duty as trustee grossly in accepting this deed from Matheney in consideration of $2,400.00, when at that very time he was offered at the public sale $3,200.00 for the land from a responsible party. But in fact Riley, the trustee, did not in a legal point of view accept this deed. His receiving it from the hands of Matheney, as we have seen, did not make it operative. All he really did on August 17, 1885, which had any legal effect, was simply withdrawing the land from public sale, which was done at the request and with the approval of Matheney.

It is argued at much length by the appellee's counsel, that

Riley, the trustee, was bound to act in his character of trustee with entire impartiality between Sandford and Matheney, to both of whom he held a trust-relation, and this being the case he was bound to act as the agent of both parties in such a way, as would promote the interest of both, and not be prejudicial to the rights of either. A very large number of authorities are cited to support this position and among them the *Anchor Stove Works* v. *James Gray et al.*, 9 W. Va. 469. But all this is not only foreign to this cause, but if it had been the enquiry directly involved in the cause, the evidence shows that the trustee, Riley, has not violated his duty by acting in a partial manner nor abused his position as trustee by regarding solely the interest of Sandford and utterly disregarding the rights and interest of Matheney. The fact that he received from the hands of Matheney this deed of August 17, 1883, conveying his land to Sandford for $2,400.00, when he knew he could get for it at least $3,200 is relied on as showing this undue partiality. But this he did not do in his capacity of trustee and did it only on the solicitation of Matheney, who after mature consideration concluded, that his interest would be thereby promoted. Riley was unwilling to do this and before doing it represented to Matheney, that he might loose several hundred dollars by doing it. But Matheney believing that Sandford did not want this farm in West Virginia, which was in a very poor condition, and which he could not well keep or cultivate, as he lived in Ohio, and could not probably sell in any reasonable time because it was of so unsaleable a character, concluded that if he could raise money in a short time, as he believed he could, Sandford would sell this farm to him at a small advance on what he paid for it, and he would thus be able to put himself in a better condition in a few months than he would be, if he permitted the farm to be sold at a low price to some other person in Jackson county, West Virginia, who would not re-sell it to him. Doubtless in making this conclusion he was influenced by the belief, that Sandford in re-selling the farm to him, would do so on liberal terms, as in his conduct toward him, Sanford had acted with great liberality theretofore. After once ordering this land to be sold by his trustee, in the spring of 1883, Sandford at his request had recalled the order,

and after having waited nearly a year without the payment of even the interest due or any part of it, and having a second time ordered the sale of the property by the trustee, Sandford had approved of the repeated postponements of the sale by the trustee for Matheney's accommodation. Under these circumstances Matheney believed, that if he could raise the money to re-purchase this land in a short time, as he thought he could, Sandford would sell it to him at a small advance above what he proposed to sell it to Sandford for. In these conclusions Matheney was only mistaken in his ability to raise money to re-purchase this farm in a short time. He was not mistaken in supposing, that Sandford would re-sell to him at a small advance; for on September 1, 1883, only two weeks after Sandford purchased the land he gave to Matheney the refusal of re-purchasing it at a small advance of from $100.00 to $300.00 according to the length of time which this right to take this land was extended to Matheney.

It is further said by the counsel for the appellee that Riley was guilty of a breach of trust in bringing on a sale of the land when it could not be sold to advantage. But Riley had as trustee no discretion as to the time, when he should offer the land for sale; for Matheney by his deed of trust had declared it to be his duty to sell this tract, if he failed to pay this debt when due, whenever he was required to do so by Sandford, and Riley was required so to do before he advertised the land for sale. His only discretion was, that, if at the sale he could not obtain any reasonable price for the land, and there was any probability of getting any better price for it, he might postpone the sale to another time. In the exercise of this discretion Riley did postpone the sale to a future day several times, and by so doing the price offered for the land was raised from $2,400.00 to $3,200.00. In all this I can see no disposition on the part of the trustee to disregard the rights and interest of Matheney or to act with partiality.

Again it is complained, that in this suit as well as in the action of unlawful detainer and in the ejectment suit Riley has acted as counsel for Sandford. And one of the frivolous objections to the answer of Sandford by the plaintiff below was that Riley had no right to act as such counsel for Sandford. What possible objection could there be to his so

doing. He never acted as counsel for Sandford in these cases or indeed in any business transaction whatever, while he was such trustee; for after August 17, 1883, when the trust-subject was sold, of course Riley ceased to be a trustee. In fact before August 17, 1883 Riley had acted in other matters as counsel for Matheney but never as counsel for Sandford. Many authorities are cited to show, that a trustee can not properly act as counsel for one of the *cestui que trust* against the other. But they are entirely irrelevant in this case. So far as the record discloses, Riley has acted fairly and impartially as trustee.

The last objection urged is, that the deed of August 17, 1883, ought to be set aside for gross inadequacy of price. We have seen, that in this case there is no evidence tending to impeach the fairness of this sale, the vendor was perfectly well acquainted with the farm he sold having lived on it for years. The vendee on the other hand lived in another State and was in all probability unacquainted with the farm personally, and all the information he had about it was derived from the statements of others in all likelihood. The vendee gave for the land a larger price than he would have been willing to give for it except for the fact, that by buying this farm he hoped to settle a debt, the collection of which annoyed him. He was doubtless willing, at the time he purchased it, to have resold it at least to the vendor for the price he gave for it, for within two weeks after he purchased it, he offered it to him at an advance of only $100.00, if he would pay for it within thirty days. The land was probably worth intrinsically between $4,000.00 and $5,000.00; but it was in a very bad condition, and in addition to that there was then a general depression in the price of lands in Jacksen county as shown by the evidence. So that it would have been probably very difficult if not impossible then to have found a purchaser for this land in any reasonable time at a price exceeding $3,500.00. A strenuous effort had been made to sell it just before, and the highest price offered for it was $3,200.00. Under these circumstances this sale ought not to be set aside for gross inadequacy of price. This Court decided in *Burford et al.* v. *McConnihay*, 15 W. Va. 433, syll. point 3, that "there being no evidence tending to impeach the fairness

of a sale it can not be set aside for inadequacy of price, unless it be so inadequate as to justify the presumption of fraud, and to justify such presumption from inadequacy alone, it must be so strong and manifest an inadequacy as to shock the conscience and confound the judgment of a man of common sense. Half the estimated value of such property is not such an inadequacy."

There is another position taken by appellee's counsel which I deem proper to notice, though in my judgment it is entirely foreign to this cause. It is insisted, that as the legal title to this land was in the trustee, Riley, on August 17, 1883, the deed by Matheney to Sandford executed that day could convey only his equity of redemption, and that therefore Sandford on such a title could sustain neither an action of ejectment nor a writ of unlawful detainer; and very many authorities are cited to sustain this position. It strikes me that counsel have omitted to bear in mind in this argument, that the effect of the acceptance by Sandford of this deed of Matheney to him was to extinguish his debt against Matheney, which was the only debt secured by the deed of trust which invested Riley with the legal title to this land. But I decline to examine the authorities cited on this subject by the counsel for the appellee or to consider whether what I have just above named would effect this question, as it seems to me, that the question is obviously entirely foreign to this cause. If it be true, that Sandford can in a court of common law for this reason sustain neither an action of ejectment nor a writ of unlawful detainer against Matheney to obtain possession of this tract of land, instead of being a reason for sustaining a decree perpetually enjoining such a suit in the common law court, it would be a strong reason why a court of equity should not grant or perpetuate such an injunction. For if the plaintiff has a complete and perfect defence to this action of unlawful detainer at common law, as is here contended, he would have no right for that cause only to come into a court of equity asking such injunction; for if the appellee's counsel be right in this position, he has no need of equitable relief having a perfect common law defence.

My conclusion therefore is, that the decree of the circuit court of Jackson of March 10, 1885, must be set aside, re-

versed and annulled; and the appellant must recover of the appellee, Wm. H. Matheney, his costs in this Court expended; and this Court rendering such decree, as the circuit court ought to have rendered, must dissolve the injunction granted and dismiss the bill and amended bills of the plaintiff, Wm. H. Matheney, in the circuit court of Jackson and decree, that the defendants below, John P. Sandford and John H. Riley, recover of William H. Matheney their costs severally expended in the circuit court of Jackson.

REVERSED. DISMISSED.

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26 412
37 492

WHEELING.

CRANMER *et al v.* McSWORDS *et al.*

Submitted June 23, 1885.—Decided July 9, 1885.

1. Where a surety pays the debt of his principal, he is entitled to interest on the whole amount paid, principal and interest, from the date of such payment in an action or suit against his principal. (p. 416.)

2. Whether the surety, who has paid costs and expenses on account of the debt of his principal, can recover the same from his principal depends upon the circumstances of each case. Under the facts and circumstances of the case at bar it is held, that the surety is not entitled to recover from his principal the costs and expenses of a suit to which the principal was not a party. (p. 417)

3. Where real estate has been sold in a chancery cause, and a decree is entered therein directing that specific debts shall be paid by the commissioner having the fund in charge out of the proceeds of such sale, such decree is, as to the owner of the real estate so sold, *prima facie* a satisfaction of such debts. If, therefore, said debts are paid by a surety, such decree directing payment from the proceeds of his property is sufficient, in the absence of countervailing evidence, to entitle him to recover the amount so paid or ordered to be paid from his principal. (p. 418.)

4. In a suit to sell the remainder of certain real estate for the payment of debts against it, in which the owner of the life-estate consents that the whole property may be sold together and a gross sum paid to him in lieu of his life-estate from the proceeds of the

sale, the court, if it is satisfied the remainder will bring a better price by selling the whole property together, may order the sale so to be made without the consent of the owner of the remainder. (p. 420.)

5. Where a decree is made for the payment of money, whether it is a personal decree against the debtor or merely against property liable for the payment of the money so decreed to be paid, the decree should be entered for the aggregate of principal and interest at the date of the decree with interest thereon from that date. (p. 421.)

The facts of the case sufficiently appear in the opinion of the Court.

J. O. Pendleton and *D. Lamb* for appellants.

W. P. Hubbard and *H. M. Russell* for appellees.

SNYDER, JUDGE:

The nature and object of this suit sufficiently appear in the opinion of this Court announced on the former appeal—24 W. Va. 595 to 606. It is, therefore, unnecessary to do more here than to state such additional matters as may be required for the proper understanding of the questions litigated in the circuit court subsequently to the former decision of this Court, and our conclusions, and the reasons therefor, upon said matters and questions.

The circuit court of Ohio county pursuant to the mandate of this Court entered a decree, October 11, 1884, referring the cause to a commissioner "to ascertain, state and report the amount which the appellants (plaintiffs) are entitled to have decreed in their favor."

The commissioner filed his report in which he allowed the following claims in favor of the plaintiffs:

"1. A promissory note signed by Daniel Zane, dated at Wheeling, March 12, 1858, payable one year after date to the order of Elish Lindsey, and assigned by him to Theodore Fink, for . $1,000 00

"Interest thereon to November 27, 1866, from March 12, 1860..... 402 50

"Interest on $1,402 50 from November 27, 1866, to December 1, 1884..... 1,515 10

——— —$2,917 60

"2. A promissory note dated at Bridgeport, Ohio, June 9, 1858, signed by Daniel Zane, and pay-

able twelve months after date, to the order of John Darrah, with interest at the rate of ten per cent. per annum from maturity, for..... 800 00
"Interest thereon from June 9, 1859, to March 28, 1867, (less two years' interest paid). . 463 40
"Interest on $1,263.40 March 28, 1867, to December 1, 1884..... 1,339 85
2,603 23

"3. A promissory note executed by Daniel Zane to John Dakin, dated January 4, 1860, with interest at ten per cent. from date (subject to the following credits: $110.00 paid January 17, 1860, and $321.78, paid December 9, 1862,) for..... 1,000 00
"Interest thereon from January 4, 1860, (less credits above mentioned) to January 9, 1867..... 367 88
"Interest on $1,367 88 from January 9, 1867, to December 1, 1884 1,468 69
2,836 57

"4. The amount paid guardian of D. Z. Phillips.. 1,050 00
"Interest thereon from July 7, 1860, to December 18, 1867 469 17
"Interest on $1,519.17 from December 18, 1867, to December 1, 1884 1,545 24
3,064 41

"5. The amount decreed Theodore Fink 2,450 00
"Interest thereon from May 24, 1864, to May 20, 1868 586 37
"Interest on $3,036.37 from May 20, 1868, to December 1, 1884 3,011 56
6,047 93

"6. A promissory note signed by Daniel Zane, dated March 12, 1856, and payable six months after date to the order of Walker Hunter, and by him endorsed (which is subject to the following credits: $171.25 paid March 28, 1857; $200.00 paid March 13, 1858, and $112.00 paid October 15, 1859,) for 690 90
"Amount of principal and interest due February 6, 1867 426 49
"Interest thereon from February 6, 1867, to December 1, 1884 455 98
882 47

"7. Amount of costs decreed in the case of Theodore Fink and wife against Daniel Zane's executors 438 13
"Interest thereon from May 20, 1868, to December 1, 1884 434 19"

The commissioner also reported the following debts which he disallowed, but states that the plaintiffs claim they are entitled to have them decreed in their favor:

"8. A promissory note signed by the said Daniel Zane, dated at Wheeling, May 1, 1860, and payable four months after date to the order of Hanson Phillips, for		$100 00
"Interest thereon from September 1, 1861, to December 18, 1867,	43 78	
"Interest on $143.78 from December 1867, to December 1, 1884	146 22	
		290 00
"9. A promissory note signed and sealed by Daniel Zane, dated at Wheeling, August 22, 1855, and payable five years after date, with interest from date, to Amon McSwords, commissioner, &c., for	625 00	
"Interest thereon from August 22, 1855, to December 18, 1867	462 07	
"Interest on $1,087.07 from December 18, 1867, to December 1, 1884	1,105 67	
		2,192 74
"10. A promissory note dated at Wheeling, September 5, 1857, signed by Daniel Zane, and payable three years after date, to the order of O. A. Zane, and by him endorsed in blank (which is subject to the following credits: $206.00 paid September 8, 1860, and $235.10 paid October 22, 1866), for	833 33	
"Interest thereon from September 5, 1857, to January 2, 1868, less payments aforesaid	50 49	
"Costs of protest	2 73	
"Interest on $886.55 from January 2, 1868, to December 1, 1881	899 84	
		1,786 39
"11. The amount paid John Darrah	800 00	
"Interest thereon from June 9, 1860, to November 2, 1867, at ten per cent.	591 78	
"Interest on $1,391.78 from November 2, 1857, to December 1, 1884	1,503 26	
		2,895 04"

The defendant, Indiana McSwords, excepted to the commissioner's report objecting to the allowance of all or any of the seven claims allowed therein for reasons which will be hereafter refered to so far as they are material to the questions involved in this appeal. The plaintiffs likewise excepted because the commissioner refused to allow the aforesaid debts claimed by them.

The court by its decree, pronounced January 31, 1885, allowed all the aforesaid debts except the last one of $800,

which is numbered eleven in the foregoing statement. The other ten debts, numbered from one to ten inclusive, were allowed by the decree andordered to be paid, except that by the consent of the plaintiffs a credit of $352.00, was deducted from the said debt No. 1. The decree aggregated said debts as of the dates they were decreed to be paid, respectively, in the suit of *Fink* v. *Zane*, that is, by adding together the two first items of each of the debts given in the statement of the commissioner hereinbefore copied, and then allowed interest on such aggregates from the dates to which the interest was calculated in such aggregation of each debt, until the same should be paid. It also ascertained that the gross sum to which Daniel F. Zane was entitled in lieu of his life-estate in the land sought to be sold, was equal to 37.92-100 of the proceeds of said land, and with the consent of said life-tenant, the court being of opinion that it was proper to do so, the said land was directed to be sold, as well the life-estate as the remainder, the proceeds of the latter to be applied to the payment of the debts allowed as aforesaid. From this decree the defendant, Indiana McSwords, obtained this appeal.

It is assigned as error that the decree improperly allows interest on the aggregates of the debts from the dates of the aggregations, as before explained, instead of allowing interest on the principal only of each debt as originally contracted. It is claimed by the appellant that this is an allowance of compound interest and, therefore, illegal and unjust. This position is founded on the theory that the plaintiffs are the assignees of the original creditors of Daniel Zane, and, thus being purchasers of the debts, they occupy the same ralation to the debtor in respect to interest that the original debtors did. This theory is untenable, because it does not recognize the true relation between parties. The right of the plaintiffs to recover in this suit arises from the fact that the property of the plaintiffs was taken to pay debts which ought to have been paid by the property sought to be sold in this suit. The property last mentioned was primarily liable for these debts while that of the plaintiffs was only secondarily liable. The latter was simply surety for the former and, consequently, the true relation is that of principal and surety and not that of assignee and debtor. It is the settled law

that where a surety pays the debt of his principal he is entitled at once, upon such payment to an action for the amount paid including principal and interest, and if payment is not made then by the principal, the surety is entitled to interest on the whole sum paid. Brandt on S. & G. sec. 178. The court therefore, properly allowed interest on the aggregate amount paid in this cause. This conclusion also disposes of the objection that the plaintiffs were improperly allowed any interest whatever.

It is further insisted that the decree is erroneous in so far as it allows the before mentioned claim No. 7, which is $438.18, the amount of costs decreed in the suit of *Fink* v. *Zane*. Whether the surety, who has paid costs on account of the debt of his principal, can recover such costs from the principal depends upon the circumstances of each case. Brandt on S. & G., sec. 187. But the principal is not liable for costs and expenses unnecessarily incurred by the surety in litigation carried on by him in order to get rid of his liability or defeat the efforts of a party seeking to enforce it. *Wynn* v. *Brooke*, 5 Rawle 106. And it is incumbent on the surety, seeking to recover from his principal costs and expenses incurred in litigation, to show that the litigation was entered into in good faith and upon reasonable grounds, and was a measure of defence, necessary to the interest of both parties, and was calculated so to result. *Whitworth* v. *Tilman*, 40 Miss. 76; Sedgw. on Dam. 335; *Redfield* v. *Haight*, 27 Conn. 31.

The relation here, as we have seen, being that of principal and surety, the rights of the parties must be determined upon the principles above laid down as applicable to that relation. The plaintiffs in this suit were the executors under the will of Daniel Zane and as such were authorized to sell real estate for the payment of the debts of their testator. They certainly had the power to sell the real estate devised to them, if not as executors they could have done so as devisees and thus paid off the debts. But instead of doing so they permitted themselves to be sued by the creditors of their testator and thereby unnecessarily incurred the costs and expenses which they now seek to recover. The decrees entered in that suit allowing and directing the payment of the debts

allowed in this suit were all, I believe without exception, entered by the consent of the present plaintiffs, thus showing that the debts were undisputed and that there was no necessity for the litigation. The appellant was no party to that suit and had no notice of it so far as the record here shows. If she is compelled to pay the costs of that suit and the expenses of selling the plaintiff's real estate, she will be compelled to pay two sets of costs and expenses, for it is certain that she will have to pay the costs of this suit and the expenses of the sale of her interest in the land now sought to sold. This would seem to be plainly unjust and inequitable. I am, therefore, of opinion that the decree is erroneous in allowing the said claim No. 7 for costs and expenses incurred in the said suit of *Fink* v. *Zane*.

The account of the disbursements, made by commissioner Z. Jacob under the decrees in the said Fink–Zane suit, copied from the private memorandum book of said commissioner, was filed as evidence in this suit, subject to the exceptions of the appellant thereto for incompetency, to prove that the proceds of the plaintiff's real estate were applied to the payment of the debts claimed in this suit. The appellant insists that said account should be excluded as evidence and, it being excluded, there is no evidence that several of the debts allowed by the decree to the plaintiffs were in fact paid from said proceeds. I do not think the said account of commissioner Jacob was admissable evidence. It is simply a private memorandum which the commissioner was not required to make by any provision of law or order of the court, and the circumstances under which it was made are unexplained. But in my view of the matter said account is immaterial. The decrees and orders in the said Fink–Zane suit show specifically that every one of the debts allowed the plaintiffs in this suit was ordered to be paid out of the proceeds of the plaintiffs' real estate in that suit. This Court on the former appeal decided that said decrees and orders were evidence to prove "that the land of the appellants (plaintiffs here) was sold by the creditors of Daniel Zane, deceased, to pay what were alleged to be debts due from his estate." 24 W. Va. 604. On this question, I concur in the view of the counsel for the plaintiffs, that when the order of the court

was made that the commissioner should pay these claims, they became thereby *prima facie* satisfied so far as the estate of Daniel Zane was concerned. The payment was ordered to be made out of the proceeds of the plaintiffs' real estate. The creditors could no longer pursue Zane's estate. If the commissioner, the officer of the court, did not pay these debts out of the fund in his hands dedicated to that purpose, the creditors could require him to do so and this would be their only resort. Brandt on S. & G. § 194; *Brown* v. *Kidd*, 34 Miss. 291. The order directing the payment of the debts out of the proceeds of the plaintiffs' property, being *prima facie* evidence of such payment, completed the right of the plaintiffs to demand reimbursement, and placed the burden of rebutting the *prima facie* payment upon the appellant. No attempt has been made to prove that the payments were not made out of the proceeds of the plaintiffs' real estate as ordered by said decrees. It has been suggested that these debts or some part of them may or ought to have been satisfied out of the personal estate or some other property of the testator, Daniel Zane, deceased; but no proof whatever was offered in support of this suggestion. It is, therefore, unnecessary to consider what would have been the effect of such proof, if it had been introduced in this cause.

It is, however, said in the opinion of this Court on the previous appeal that the plaintiffs, "by the recitals in said orders and decrees, are not relieved from establishing the justice and legality of the said debts;" 24 W. Va. 605. This brings us to the enquiry whether the debts allowed in the decree appealed from have been legally established?

The said debts Nos. 2 and 9 originally for $800.00, and $625.00, respectively, the appellants counsel concede have been properly proved and established. Of the other debts allowed by the decree, those designated as Nos. 1, 4, 5, 6, 8 and 10, are fully established by the proofs in the record, upon the view taken of the evidence and the burden of the proof as hereinbefore indicated in this opinion.

It has already been shown that No. 7 was improperly allowed. This leaves Nos. 3 and 11 to be considered.

No 3, the commissioner states as founded on "a promissory noted executed by Daniel Zane to John Dakin, dated January

4, 1860, for $1,000.00." The note here referred to is not produced, and the appellant earnestly insists that this debt is not legally proved. In support of this claim the plaintiffs filed a certified copy of a mortgage, dated January 4, 1859, by which Daniel Zane conveyed to John Dakin certain real estate in the State of Ohio to secure a note of same date executed by Zane to Dakin for $1,000.00, due January 4, 1860. This claim was asserted, as the record shows, in the Fink–Zane suit, in which the original note may be presumed to have been filed and it being admitted that the papers in that suit have been lost, it, therefore, seems to me that in the absence of any adverse testimony or impeaching circumstanstances, the said debt has been sufficiently established. *Calwell* v. *Prindle*, 11 W. Va. 307.

The appellees, the plaintiffs below, by counter assignment of error claim that the decree appealed from is erroneous, because it does not allow the aforesaid claim No. 11. As evidence of this debt the plaintiffs filed before the commissioner a note executed by Daniel Zane and H. W. Phillips to John Darrah for $880.00, dated January 24, 1857, subject to two credits of $88.00 each, and the commissioner disallowed it because it does not correspond with the allegations of the plaintiff's bill. The claim described here as No. 11 by the commissioner, is unquestionably the same as No. 2 which, as before shown, is allowed by the decree. This fact the appellants seem to admit, but insist that inasmuch as they have mentioned in their bill three claims as having been paid to John Darrah, only two of which have been allowed to them, they should be allowed No. 11, as the third debt claimed in their bill. I do not think this position tenable. The fact is, all the Darrah debts asserted in the bill have been allowed. Two of them being the same debt, were properly allowed as but one claim, and the third having been also allowed, they have all they asserted in their bill. I am of opinion, therefore that the court did not err in refusing to allow said claim No. 11.

The appellant contends that the circuit court erred in ordering the sale of the life-estate of D. F. Zane and remainder together, and insists that the remainder, being all the plaintiffs had a right to sell, they could not, without her permis-

sion, encumber the sale of that with the life-estate, to her probable detriment. This objection to the decree seems to be founded principally, if not solely, upon the idea that the appellant may be put to a disadvantage as a purchaser of her remainder at the sale under the decree, that is, that she may be able to purchase the remainder and thus relieve it from the demands of the plaintiffs but she may not be able or willing to purchase the whole fee including the life-estate.

It seems to me this contention is based on a mistaken view of the rights of the appellant. She certainly has rights as the owner of the estate to be sold, which the court is bound to respect. But she has no rights as a prospective purchaser of that estate. In respect to that she stands as any other person who may desire to purchase. The question and the only question for the court in that regard, is to determine in what manner a sale of the estate it has the right to sell can be made so as to produce the best price, and then to order the sale to be made in that manner. If the life-tenant consents that his interest may be sold, (and no sale of that interest could be made without his consent,) the court, if it is satisfied that a sale which embraces the life-estate, will result in a better price for the remainder than it would bring if sold separately, should order the sale to be made in that manner. This is a very common practice and I see no objection to it.—*Tracy* v. *Shumate*, 22 W. Va. 474, 500; *Laidley* v. *Kline*, 8 *Id.* 218, 229 *Holden* v. *Boggess*, 20 *Id.* 62.

The decree, as before stated, does not aggregate the whole amount allowed the plaintiffs but it ascertained the several claims to which they were entitled and gave interest on each from the dates, respectively, at which the plaintiffs became entitled to recover them. In this respect the decree is erroneous. The statute requires that where there is a decree for the payment of money, it shall be for the aggregate of principal and interest due at the date of the decree, with interest thereon from that date. Sec. 16, ch. 131, Code, p. 627; *Shipman* v. *Bailey*, 20 W. Va. 140: *Bank* v. *Goode*, 21 *Id.* 455; *Douglass* v. *McCoy*, 24 *Id.* 722, 728.

In this cause the money is not due from the appellant personally and no personal decree could be rendered against her, but it is a decree for money which is a charge upon the prop-

erty sought to be sold. The reason of the rule as well as the terms of the statute make it equally applicable whether the decree is against property or personally against the debtor.

For the errors hereinbefore pointed out. I am of opinion that the said decree of January 31, 1885, should be reversed and sued decree entered by this Court as the said circuit court should have rendered and the cause remanded to said court for further proceedings.

REVERSED. REMANDED.

WHEELING.

STATE v. OLIVER.

Submitted June 22, 1885.—Decided July 9, 1885.

26 422
d56 216

1. The sale of cider or crab-cider without a State license therefor is not prohibited by the first section of ch. 107 of the Acts of the Legislature of 1877.

2. According to the true intent and meaning of said statute, neither cider nor crab-cider is included in the terms "spirituous liquors, wine, ale, porter, beer, or any drink of like nature."

The facts of the case are stated in the opinion of the Court:

McCorkle & McCorkle and *Watts & Camden* for plaintiff in error.

Alfred Caldwell, Attorney-General, for the State.

The question in this case is : Does ch. 32, sec. 1 of the Code as amended by ch. 107 of Acts 1877 prohibiting the sale without a State license of "spirituous liquors, wine, porter, ale or beer, or any drink of a like nature," prohibit the sale of intoxicating crab-cider without such a license ?

The statute is not only a revenue measure, but also a law to provide as far as possible against the evil of intemperance. (Code, ch. 32, as amended by ch. 107 Acts of 1877.) The intent of sec. 1 was to require a license for the sale of *all intoxicating liquors*; and this intent is as clearly expressed as if the statute had used the words "intoxicating liquor" in lieu of the words

"spirituous liquor, wine, porter, ale or beer, or any drink of a like nature."

It is contended by the State that cider of any kind, which is *intoxicating* is a drink of "a like nature" with "wine," and that its sale is prohibited unless under license. Wine and cider are both the juices expressed from fruit. (Web. Dict.) In both cases this juice when fermented will produce intoxication. Had the word "wine" and the words "or any drink of a like nature" been omitted from the statute, the courts could well have held that the selling without a license of intoxicating cider was prohibited by the use of the words "spirituous liquors." The sale of such cider without a license is certainly then prohibited by a statute which in addition to the words "spirituous liquors" uses also the words "wine or any drink of a like nature." Intoxicating cider is a "drink of a like nature with the wine meant in the statute. (*Raw* v. *People*, 63 N. Y. 277; *State* v. *Haymond*, 20 W. Va. 22; *Godfriedson* v. *People*, 88 Ill. 284; *State* v. *Starr*, 67 Me. 242; *Commissioners* v. *Taylor*, 21 N. Y. 173; *Commonwealth* v. *Blos*, 116 Mass. 56.)

The indictment was sufficient to justify the judgment; and it was not necessary to describe the particular kind of liquor sold. (80 N. C. 439; 47 Vt. 297; 56 Ind. 153; 14 Gray 99; 63 N. Y. 277.)

WOODS, JUDGE:

L. B. Oliver was indicted in the circuit court of Kanawha county, for selling in that county, without a State license therefor, "spirituous liquors, wine, porter, ale, beer, and drinks of like nature" against the peace, &c. To this indictment the defendant pleaded not guilty, and neither party requiring a jury, by consent of parties the cause was tried by the court in lieu of a jury, and having heard the evidence and argument of counsel, the court found the defendant guilty, who thereupon and before judgment, moved the court to arrest the judgment and to set aside its finding, because the same was contrary to the law and the evidence, and award him a new trial, which motions the court overruled, to which rulings of the court the defendant excepted and filed his bill of exceptions, wherein all the facts proved at the trial are certified by the court, which then entered upon its finding, a judgment against the defendant for a fine of ten dollars and the costs of the prosecution.

To this judgment the defendant obtained a writ of error.

It appears from the defendant's bill of exceptions that the State to maintain the issue on its part proved the following facts: "That the defendant, Oliver, in the county of Kanawha, within a year before the finding of the indictment, sold crab-cider once to one party and received pay therefor, and said cider when drank in large quantities will intoxicate, and in sufficient quantities is intoxicating," and this was all the evidence in the cause.

The plaintiff assigns as error.

First.—That crab-cider is not embraced within the meaning of the statute prohibiting the sale of "spirituous liquors, wine, porter, ale, beer, or drinks of like nature;" and

Second.—If it is so embraced the facts proved were insufficient to convict him of the offence charged in the indictment.

The second ground of error is easily disposed of, for if crab-cider is a spirituous liquor, or wine, or a drink of like nature of either, or of porter, ale or beer—then it would seem clear that he was rightfully convicted, for there is no doubt that the court acting in lieu of a jury was fully warranted, in finding that he did sell crab-cider in Kanawha county to some person within one year before the finding of the indictment.

The only material question here presented for consideration, is whether by a proper construction of the statute in regard to the sale of spirituous liquors, &c., without license, the sale of crab cider is prohibited. But for the provisions of this statute, the sale of all these liquors would be lawful; every-one would be at liberty to engage in the traffic in them that was inclined to do so, as in the traffic in every other article of commerce; but because the unrestricted sale of spirituous liquors, leads to great domestic and social evils, the legislature has, in its wisdom, from time to time, regulated, restricted and even prohibited, the trafic in spirituous and other liquors, by requiring special licenses, to conduct the business and imposing fines and penalties upon such persons as engage in this business without being specially authorized to do so. Unless restrained by constitutional inhibitions from doing so, the power of the legislature to

restrict, limit or even prohibit the traffic in spirituous liquors is unquestionable. But as the trafic in spirituous liquors is not in itself unlawful, and is only made so, by positive enactments, restricting, limiting or prohibiting the same, we must look to the enactments themselves, and form our conclusions by a fair and just interpretation of their provisions, as we find them upon the statute book.

While there is no direct proof, wherein crab-cider, in any respect differs if at all, from common cider, yet it seems to be a fact admitted on the part of the State, that crab-cider, is cider made from the crab apple, wild or cultivated.

It is not going too far to assert, that among all the artificial or manufactured beverages in common use in this State, and we may add in the United States, the expressed juice of the apple or "cider," is the most common, the least expensive, and the most harmless; in its unfermented state, it is absolutely innoxious, and even when fermentation has commenced, unless arrested, it is very soon changed into vinegar. This common beverage found in every locality, used more or less at certain seasons by all classes of our people, as well for many culinary purposes, as for a beverage, would naturally be present in the mind of every legislator who was endeavoring to classify and arrange such artificial drinks, the trafic in which he would deem hurtful to the public, and which ought to be restricted, limited or prohibited altogether. The same would be true of distilled spirits of every kind, whether known as alcohol, whisky, rum, brandy, gin, and all combinations or mixtures thereof, as the foundation, or active principle in all of them, would necessarily be the free alcohol entering into their composition: with these he would naturally associate, other liquors in common use, not the result of distillation, but such as by experience and observation were found to contain appreciable quantities of alcohol, and to produce intoxication, such as wine, and the different forms of drinks manufactured from malted grain of various kinds and commonly known as ale, porter and beer.

The first section of ch. 107 of the Acts of the Legislature 1877 declares that "No person without a State license therefor shall * * * sell, offer or expose for sale spirituous liquors, wine, porter, beer, or any drink of a like nature. And all

mixtures or preparations known as 'bitters,' or otherwise, which will produce intoxication, whether they be patented or not, shall be deemed spirituous liquors within the meaning of this section."

It will be observed that four classes of liquors are here designated:

First: "Spirituous liquors," including all *mixtures* known as "bitters" or otherwise, which will *produce intoxication.* Second: Wine. Third: Ale, porter, beer, and fourth, any drink of a like nature.

The words "spirituous liquors," do not include wine, or other fermented liquor, for they imply that the beverage is composed in part or fully of alcohol extracted by distillation. Bishop on Statutory Crimes, sec. 1009. Wines may or may not be spirituous—depending upon the absence or presence of alcohol in each evolved in the process of the fermentation of the juice of the grape or other fruit out of which it is made. Ale, porter and beer are neither the result of distillation, nor of the fermentation of the juice of any kind of fruit. Webster defines beer—"a fermented liquor made from any kind of malted grain, with hops or other flavoring matters; also as a fermented extract of the roots and other parts of various plants, as spruce, ginger, sassafras." He defines ale to be a liquor made from an infusion of malt by fermentation, differing from beer in having a smaller proportion of hops. In like manner he defines "porter" to be "a malt liquor of a dark brown color, moderately bitter and possessing tonic and and intoxicating qualities." From these definitions it will be perceived, that ale, porter and beer, are drinks of like nature, differing from, but similar to each other, but wholly different from spirituous liquors and wine. How many other different drinks of like nature may be made from different malted grains or mixtures thereof, or from grains differently malted and flavored, or whether they would in a greater or less degree than ale, porter or beer, produce intoxication, we have no means of determining. All spirituous or distilled liquors, and all wines, being by the terms of the act embraced within the prohibition, other drinks could not be of a like nature without at the same time being of the same nature, and if of the same nature, it would be a useless proceeding to describe

them as drinks of like nature. But when the words, "drinks of like nature" are applied to ale, porter and beer, they will include all similar preparations made by similar process of fermentation of similar nature, for then we may reasonably conclude they will be of like nature, and if of like nature, then by the terms of the act they are within the prohibition thereby imposed upon the sale thereof.

Cider is neither produced by distillation nor by fermentation, and although liable to fermentation, and when subjected to distillation, it is capable of producing a spirituous liquor, yet the ultimate product is no more like cider, than rum is like the juice of sugar-cane from which it is manufactured; neither is cider the result of any process of fermentation whatever, nor is it in any proper sense a mixture of any liquor other than water, which is common to all spirituous liquors wines, ale, porter, beer and all drinks of like nature. Not being a distilled liquor, neither is it a mixture known as "bitters" or otherwise, which will produce intoxication and therefore declared for the purpose of the act "spirituous liquor." Nothing can be so included unless both of these qualities unite in it; first it must be a mixture, second, a mixture which will produce intoxication. Being the unadulterated juice of the apple, it is no mixture, and under ordinary circumstances incapable of producing intoxication, it can not be classed as a spirituous liquor, neither can it with any degree of propriety be called "wine," and it is wholly unlike any fermented liquor made from a malted grain, or from the roots of plants or bark of trees as spruce, ginger, sassafras, birch and sarsaparilla. It must be observed that the act of the legislature lays no stress whatever upon the fact, that any of the liquors mentioned or included in it, the selling of which without licence is prohibited, are "intoxicating." It is therefore wholly immaterial whether all or any of them are intoxicating or not, and no inquiry as to this fact can be entered into; and it would be no defence if the accused were able to prove that any of the prohibited liquors was absolutely free from all intoxicating qualities. The unlicensed sale of any or all of them is unlawful, because the legislature has so declared, and not for any other reason. With the motives which induced the legislative mind to in-

clude in its prohibition the sale of spirituous liquors, wine, ale, porter, beer and any drink of like nature, and fail to include cider, we have nothing to do, nor are we in any degree responsible for what they have done, or what they may have failed to do, nor have we any authority or disposition to supplement their work by a strained judicial construction which will extend its prohibition to subjects not clearly embraced by it, even if we are of opinion that it would have been wiser or better for them to have done so. The very fact that in all the various modifications of this statute, no legislature has ever ventured to include cider among the prohibited drinks, is a strong argument against the proposition so ably argued by the Attorney-General, that it is included and prohibited by the words "any drinks of like nature;" and when considered in connection with the early legislation of Virginia on this subject, is conclusive in our mind against it. The earliest legislation on this subject to which we have had access is found in the Code of Virginia of 1792. By sec. 4 of ch. 107 of that Code, it was enacted, "If any person without a license therefor, shall open a tavern or sell by retail wine, *beer, cider*, rum or brandy or spirituous liquors or a mixture thereof to be drunk in or at the place where it shall be sold, * * * * * * such offence shall be deemed a breach of good behavior, and he or she so offending shall forfeit and pay the sum of $30.00." Here the selling of *beer* and *cider* is placed precisely upon the same ground as wine, rum, brandy or other spirituous liquors, and of course became unlawful, not becasue they were intoxicating, but because in terms expressly prohibited. This continued to be the law of Virginia until the adoption of the revised code of 1819 when it was enacted by sec. 8 of ch. 240 of that code: "If any person without such license shall open a tavern, or sell by retail, wine, rum, brandy or other ardent spirits, or a mixture thereof to be drank in or at the place where it may be sold. * * * * shall be deemed a breach of good behavior, and shall moreover forfeit and pay the sum of $30.00." Thus it appears that after an experience of twenty-seven years the general assembly of Virginia removed the prohibition upon the sale of beer and cider.

By sec. 18 of ch. 38 of the Code of 1849, the provision

contained in the Revised Code of 1819 was re-enacted without any change whatever. By the act of the general assembly, passed in 1850, and carried unchanged into sec. 32, of ch. 38 of the new edition of the Code of Virginia published in 1860, it was enacted that "If any person sell by retail wine, ardent spirits or a mixture thereof, ale, porter or beer, or such like drinks to be drunk in, or at the store or place of sale, he shall unless he be licensed to keep any ordinary at such place forfeit $60.00." This continued to be the law of Virginia and West Virginia until November 23, 1863, when the legislature passed the act contained in ch. 113 of the Acts of 1863, by the first section whereof it was declared "No person without a license therefor * * * * shall sell, offer or expose for sale at retail, spirituous liquors, wines, porter, ale or beer, or any drink of like nature," and prescribed what should be deemed selling at retail, and fixed the penalty for a violation of this provision at not less than $10.00, nor more than $100.00. This provision unchanged in any material respect was carried into sec. 1 of ch. 32 of the Code of West Virginia of 1868, with the addition thereto now found in sec. 1 of ch. 107 of the Acts of 1877, in regard to the sale of "*mixtures*, known as bitters," &c.

In pursuance of sec. 46 of the Article VI. of the Constitution of 1872, authorizing the legislature "to pass laws regulating or prohibiting the sale of intoxicating liquors within the State," an act was passed April 4, 1873, entitled "An act to provide against the evils resulting from the sale of intoxicating liquors in the State of West Virginia." Many of the provisions of this act were entirely novel to the former legislation of the State, and highly penal in their character, and if it had been permitted to remain upon the statute-book, and its provisions could have been enforced in the spirit of its enactment, the expectations of its friends, who hoped to arrest the evils resulting from the sale of intoxicating liquors, might have been in a great degree realized.

By sec. 1 of the last mentioned act, it was enacted, that "It shall be unlawful for any person or persons by agent or otherwise without first having obtained a license therefor, to sell in any quantity intoxicating liquors to be drunk on, upon, or about the building or premises where sold, or to sell

such intoxicating liquors to be drunk in any adjoining room, building or premises, or other place of public resort connected with said building; *Provided*, that no person shall be granted a license to sell or give away any intoxicating liquors, without first giving bond, with two good and sufficient securities, to be freeholders and residents of the county, in the penal sum of at least $3,000.00, conditioned that they will pay all damages to any person, or persons, which may be inflicted upon them either in person or property, or means of support, by reason of the person so obtaining a license, selling or giving away intoxicating liquors."

By the second section it was made unlawful for any person by agent or otherwise to sell intoxicating liquors behind screens, frosted windows, or any other device designed or intended to protect the seller from public observation.

And by the third section it was made unlawful for any person to to sell intoxicating liquors to minors unless upon the written order of their parents, guardians or family physicians, or to persons who are in the habit of getting intoxicated.

For a violation of either of these provisions, the offender, was required to pay a fine of not less than $20.00 nor more than $100.00, and be imprisoned in the county jail not less than ten nor more than thirty days. This act, for the first time in the legislation of Virginia or West Virginia abolished the specification of the different prohibited liquors or drinks, and for the first time made it necessary to allege that any particular kind of liquor sold, was or was not intoxcating. The statute made the sale of all intoxicating liquors, alike unlawful. Under this act, the sale of such kinds of beer as were not intoxicating became lawful, which under the former acts were criminal, because they were in terms prohibited by it. This act was repealed by ch. 107 of the Acts of 1877, under which the indictment in the case now under consideration was found.

The first section of this act as we have already seen readopts the language of the 1st section of the 32d chapter of the Code of West Virginia and forbids every person not having a State license therefor, "to sell, offer or expose for sale spirituous liquors, wine, porter, ale, beer, or any drink of like nature."

Thus it appears that while cider was declared one of the prohibited drinks in the Code of 1792, and so continued until the revision of the Code in 1819, when it was dropped from the statute, it has never since been restored. And when we call to mind the learning, care and diligence with which the Code of Virginia of 1849, was prepared; and the careful revision and re-enactment of this provision of the law by the several legislatures of Virginia and West Virginia, without restoring *cider* by name to the prohibited drinks, as it stood before the revision of 1819, no doubt remains in our mind that the sale of cider without a State license, is not a violation of sec. 1 of ch. 107 of the Acts of 1877, and we are therefore of opinion that the finding of the circuit court in the case under consideration was contrary to the law and the evidence.

The Attorney-General in his learned argument, has referred the Court to a large number of adjudicated cases in various States, wherein some branches of this subject have been considered, but after a careful review of them he frankly admits they do not afford much assistance here to the Court upon the point now under consideration, as they have been made upon statutory provisions there existing, which do not exist in this State. We have carefully reviewed all these cases, and we find that all of them have been decided with reference to the effect or operation of some particular statute, not in operation in this state. This is especially true of the cases of *State* v. *Starr*, 67 Maine 242; *State* v. *Page*, 66 *Ib.* 418.

State v. *McNamara*, 69 *Ib.* 133; *State* v. *Preston*, 48 Vt. 12; *Raw* v. *People*, 63 N. Y. 277. The *State* v. *Packer*, 80 N. C. 439, was an indictment for selling "intoxicating liquors," and the proof showed that the liquor sold was port wine, and this was properly held to be "intoxicating liquor."

State v. *Lowry*, 74 N. C. 121—was an indictment for selling spirituous liquors, and the proof showed the sale was of domestic blackberry wine, and the court held that whether such wine was spirituous liquor, was a question for the jury.

Godfriedson v. *People*, 88 Illinois 284, was an indictment for selling "intoxicating liquors" and the proof was that the liquor sold was a kind of malt liquor of an intoxicating quality

called "Pop." The jury found the defendant guilty upon each of twelve counts in the indictment, and the court held the conviction proper.

State v. *Biddle*, 54 N. H. 379, was an indictment for keeping for sale "intoxicating liquors"—and the proof showed that the liquors kept for sale were ale and cider. The trial court ruled that ale and cider after firmentation is completed are "intoxicating liquors," without proof of the amount of alcohol which they may contain; but the supreme court reversed this judgment of the trial court, and held, that whether they are intoxicating or not, is a question for the jury. *State of Vermont* v. *Reynolds*, 47 Vt. 297, was an indictment for owning, keeping, and possessing intoxicating liquors with intent to sell the same &c., and the court held that by the terms "intoxicating liquors," any kind of liquor, that would intoxicate was included. The *Board of Commissioners of Excise of Tompkins county* v. *Taylor*, 21, N. Y. 173, was a prosecution for selling without a license, "strong or spirituous liquors," and the court held that "strong beer" or any liquor is within the statute whether fermented or distilled, of which the human stomach can contain enough to produce intoxication

Commonwealth v. *Bloss*, 116 Mass. 56, was an indictment for keeping a tenement used for the illegal sale of "intoxicating liquors," and the proof was that the liquor sold, was neither distilled spirits, ale, porter, strong beer, or lager beer, but was an entirely distinct and different article, and recognized as such in the trade, containing not more than half the stock as lager beer, and known as "schenk beer," which was fit for use in a short time after it was brewed; the court held, that whether the liquor sold was intoxicating or not was a question for the jury, and the fact that although alcohol was discovered in it upon chemical analysis, though competent evidence, does not necessarily prove that the liquor sold was "spirituous" within the statute.

In *Commonwealth* v. *Dean*, 14 Gray 99, which was also an indictment for selling "intoxicating liquors," and the proof was, that the liquor sold, was unfermented cider; it was held that the trial court correctly refused to instruct that the sale of unfermented cider was not prohibited, because by the

express words of the statute it was declared that "ale, cider and all wines" should be considered intoxicating within the meaning of the act. From this review of these cases, we find no reason to cause us to doubt the correctness of the conclusion which we have already announced. Nearly all of these cases are for selling "intoxicating liquors," while as we have already shown, under our statute it is wholly immaterial whether they are intoxicating or not, if not embraced within the list of spirituous liquors, wine, porter, ale, beer or drinks of like nature. While we are not called upon to decide, and we do not decide what drinks are embraced in the terms "any drinks of a like nature," yet we are of opinion, that cider or crab-cider is not one of the drinks intended to be prohibited as one of "the drinks of like nature" mentioned in the statute. The judgment of the circuit court of Kanawha is therefore reversed.

And this Court proceeding to render such judgment as the said circuit court ought to have rendered upon the facts certified do find the defendant not guilty, and judgment must be entered for the defendant.

SNYDER, JUDGE, dissenting:

I am unable to agree with either the reasoning or the conclusion of my brethren as contained in the preceding opinion. The controlling principle of that opinion is, that the statute was not intended to regulate or restrict the sale of liquors or drinks because they are intoxicating. It says, that the statute "lays no stress whatever upon the fact that any of the liquors mentioned or included in it * * are intoxicating;" and declares that, "it is therefore wholly immaterial whether all or any of them are intoxicating or not." This it seems to me, with all deference, is a plain and obvious misconception of the manifest and declared object and spirit of the statute. Not only does the history of the legislation of Virginia and of this State on the subject, as set forth in the preceding opinion, clearly demonstrate a settled and distinctive intent and purpose to suppress the evils resulting from the unrestricted sale of intoxicants, but the same object

and purpose is with equal distinctness manifested both in the language and spirit of the very statute under consideration. This is declared in its title: "Regulations respecting licenses; injuries to persons arising from illegal sales of *intoxicating* liquors; remedy therefor."

The very section under which the indictment here was found uses the terms "intoxicating drinks" and mixtures "which will produce intoxication," and expressly prohibits their sale without a license. These terms are general and the proscribed drinks and mixtures are not otherwise described or designated than as intoxicating. If they are "intoxicating" or will "produce intoxication" they are prohibited, and if they are not they are not inhibited. Therefore, if cider or a mixture composed of cider and something else will produce intoxication, then, even though the thing mixed with the cider is entirely free from intoxicating ingredients, the sale of cider or such mixture requires a license under the statute. It necessarily follows from this conclusion, that if the decision of the majority of the Court is correct, a person may be indicted and convicted for selling cider at a public theatre or when mixed with molasses or ginger, yet if it is sold unmixed at any other time or place, although it may be proven to be intoxicating in the one case as much as in the other, he can not be indicted or convicted. And upon such construction these contradictions and inconsistancies exist not only in the same statute but in the same section and in part in the same sentence of the same section.

But this is not all. The same intent and object are apparent in all the other sections of the statutes which refer to liquor license, as will be found by an inspection of sections from eleven to eighteen inclusive. And section 44 declares that, "The provisions of this chapter shall in all cases be construed as remedial and not penal."

It seems to me, that no one can read this statute even carelessly without an absolute conviction, that it was intended by this statute not simply to produce revenue, but that the primary and principal object was to regulate and suppress as far as practicable the unrestricted and irresponsible sale of liquors or drinks, not because they are composed of specific ingredients or made in a certain manner or designated by particular

names, but because and only because they produce intoxication.

In my view it is altogether unimportant and unnecessary to indulge in any speculation or analysis as to the constituents or ingredients of which the liquors or drinks mentioned in the statute are composed, the manner in which they are made or manufactured or the difference or similarity between them and others not specifically mentioned in it. The real test furnished by the true interpretation of the statute itself is, whether or not the liquor or drink in question is intoxicating. If it is, such drink is proscribed; if it is not and is not one of the specific liquors or beverages named in the statute, then it is not proscribed. Certain liquors or beverages were known to the legislature from common observation, if not from experience, to be capable, when drunk, of producing, and which do generally result in, partial or total intoxication. These are positively and by name proscribed. Any inquiry as to the effects of these are placed by the statute beyond the control of the courts or juries; but as new intoxicants might be invented and as some liquors or drinks may in one form or state of fermentation produce intoxication while in other conditions they may not, it was impracticable for the legislature to foresee and provide for such drinks. The statute, therefore, intending to proscribe all intoxicating liquors and drinks, without interfering with those that may not be so, employed this explicit and comprehensive language: "No person without a State license therefor shall * * * sell, offer or expose for sale, spirituous liquors, wine, porter, ale or beer, *or any drink of a like nature.*"

Now it is a matter of common observation and general knowledge that each and all of the beverages specifically named in the statute are intoxicating when drunk in less or greater quantities, and it is also equally well known that they contain no other quality common to each and all of them. They are each and all intoxicating in their nature, but they are not all of the same nature in any other respect. The conclusion, therefore, is inevitable that no other drink can be of "a like nature" with these in the language and intent of the statute, unless it be intoxicating, as that is the only quality common to all of them.

But, if the true interpretation of the statute were doubtful, the rules of construction would bring us to the same conclusion; for it is a cardinal rule that, "Where the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and the remedy in view, and the intention is to be taken or presumed according to reason and good discretion so as to prevent the mischief and advance the remedy." Dwarr. 194.

On the construction of this statute and the evil intended to be prevented this Court in *State* v. *Haymond*, Johnson, President, delivering the opinion, says: "It is certainly the evil of tippling, that is designed to be prevented by our act." 20 W. Va. 22. This is exactly what the statute itself demonstrates was the legislative intent. If, therefore, crab-cider is intoxicating, as is certified to be the fact in this case, then it is within the evil intended to be prevented, and the statute must be construed to embrace it in order to advance the remedy, unless the language and spirit of the statute plainly exclude it.

Upon the whole case and in view of the past history of the legislation on this subject, the language and spirit of the statute under consideration, the evil sought to be prevented and the common sentiment of the people generally, it seems to me but little short of absurd to contend that this statute "lays no stress whatever upon the fact that any of the liquors included in it are intoxicating." On the contrary, every consideration, which can properly be invoked in its construction, inevitably leads to the positive conclusion that the great and paramount object and design of the legislature in adopting it was to restrain, not by absolute and indiscriminate prohibition, but by a process of regulation and restriction, the sale of any and every kind of intoxicating liquors and beverages. *Board of Commissioners* v. *Taylor*, 21 N. Y. 173; *Raw.* v. *The People*, 63 *Id.* 277; *State* v. *Reynolds*, 47 Vt. 297; *Godfriedson* v. *The People*, 88 Ill. 284.

Crab-cider not being one of the drinks proscribed by name in the statute, the question whether or not it was intoxicating was one of fact to be determined by the jury, or the court acting in lieu of a jury, from the evidence in the case. *State*

v. *Biddle*, 54 N. H. 379; *Commonwealth* v. *Chappel*, 116 Mass. 7; *State* v. *Starr*, 67 Me. 242.

The court acting in lieu of a jury having found in this case that the crab-cider sold by the defendant was intoxicating, the judgment of the circuit court was right and should be affirmed.

SEPTEMBER TERM.

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CHARLESTOWN.

GRAFTON *v.* REED *et al.*

Submitted June 13, 1885.—Decided September 19, 1885.

1. No precise rule can be laid down defining the extent and limits of the concurrent jurisdiction, which courts of equity will exercise with courts of law in matters of account. In such matters courts of equity reserve to themselves a large discretion, in the exercise of which they will pay due regard to the nature of the case and the situation and conduct of the parties. (p. 439.)

2. If the averments of the bill show that the specific accounts can be fairly determined in a court of law, and that no discovery is necessary, the simple fact that the bill contains vague and general statements as to the inadequacy of the remedy in a court of law, or the necessity for some discovery from the defendant, without stating the specific facts showing that there is such inadequacy in the remedy at law or necessity for a discovery, such statements will be considered merely as pretexts for foisting a jurisdiction upon courts of equity, which does not belong to them, and they will be disregarded and jurisdiction declined. Such, in the view of the Appellate Court, is the character of the jurisdictional averments of the plaintiff's bill in this cause. (p. 440.)

The facts of the case appear in the opinion of the Court.

Martin & Woods, for appellant.

M. H. Dent, for appellee.

SNYDER, JUDGE:

Suit in equity instituted in the circuit court of Taylor county, June, 1882, by the town of Grafton against Thomas A. Reed, Adolphus Armstrong and others, to settle the accounts of the defendant Reed as sergeant of said town for two terms of office, and to obtain a deceee against him and his sureties for money alleged to be due from him as such sergeant. The cause was referred to a commissioner who filed his report showing a liability on the said sergeant and his sureties for the sum of $2,174.65. The court, on March 31, 1885, confirmed said report and decreed that the plaintiff recover from said sergeant and his sureties on the bond for his second term the said sum of $2,174.65 with interest and costs. From this decree the defendant Adolphus Armstrong appealed to this Court.

The appellant and Reed demurred to the plaintiff's bill and their demurrer was overruled by the circuit court. It is now insisted by the appellants that this action of the court was plainly erroneous.

The substance of the plaintiff's bill is, that the said Thomas A. Reed was duly appointed sergeant of the town of Grafton for the year 1877, and gave bond as such with John W. Mason and others as his sureties; that in March, 1879, the plaintiff made a final settlement with said Reed for said year 1877, and found due from him to it $1,088.90; that afterwards, in October, 1879, said Reed was again appointed sergeant of the plaintiff for the year 1879, and gave bond as such with the appellant Armstrong and others as his sureties; that in March, 1880, the plaintiff made another settlement with him and found that there was then due from him $4,141.32; that the plaintiff then brought an action at law against him and his sureties on said bond of 1879, for said sum which action is still pending; that upon an incomplete settlement, subsequently made, the said Reed showed that he was entitled to further credits which reduced the balance due from him to $2,190.32, all of which remains due to the plaintiff and unpaid; that the defendant Reed and his sureties on said second bond *claim* that said sureties on the first bond should pay said $1,088.90, and not the sureties on said second bond, and that they are preparing to make such defence in

said action at law, thus placing the plaintiff in said action at the mercy of said Reed who is the only one in a condition to know the truth of said claim on account of the confusion by him of his transactions during his two terms of office; that said Reed is hopelessly insolvent, and owing to the confused state of his accounts and the different rights of the parties the remedies at law are inadequate; that relief can only be properly obtained in a court of equity upon a discovery of the true state of said accounts by the said Reed himself; and that plaintiff, therefore, prays the said "Reed may be compelled upon oath to discover: *first*, how much of said $2,190.32 is properly chargeable to him and his sureties for the year 1877; and *second*, how much of said sum is properly chargeable to him and his sureties for the year 1879;" that the true state of his accounts may be ascertained and a decree rendered in favor of the plaintiff against the defendants severally for the sums with which they are respectively chargeable, &c., &c.

The question presented is, whether or not the allegations of said bill show grounds for relief in a court of equity? There is no doubt that courts of equity have jurisdiction concurrent with courts of law in matters of account where the accounts are mutual and complicated, and also where they are all on one side, if discovery is sought and is *material* to relief; but when the mutual accounts are not complicated, or the accounts are all on one side and no discovery is *required*, courts of equity will decline jurisdiction. *Gleninger* v. *Hazard*, 42 Pa. St. 401; *Laferer* v. *Billmyer*, 5 W. Va. 33. This equitable jurisdiction is, however, not exercised in matters of accounts, as it is in many other cases, merely to prevent injustice which might arise from the exercise of a purely legal right, or to enforce justice in cases in which courts of law can not afford it; but the jurisdiction is concurrent with that of courts of law, and is adopted, because in certain cases it has better facilities for ascertaining the rights of parties. It is, therefore, impossible to lay down with precision rules or fixed definitions applicable to all cases in which it may be proper for equity courts to exercise this jurisdiction. The infinitely varied transactions of mankind would be continually found to baffle such rules and escape such definitions. Courts have, therefore, as a

necessity reserved to themselves a large discretion, in the exercise of which due regard must be had not only to the nature of the case, but to the situation and conduct of the parties. *North-Eastern Railway Company* v. *Martin*, 22 Eng. Ch. 758.

Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of equity can not draw to itself every transaction between individuals in which accounts between the parties are to be adjusted. In all cases in which an action of account would be a proper remedy at law, and in all cases involving trusts or confidential relations resulting in transactions which can not be adequately adjusted at law, the jurisdiction of a court of equity is undoubted. But in transactions not of this peculiar character, some difficulty at law should interfere, or some discovery should be necessary to the relief sought, in order to confer jurisdiction upon a court of equity. *Fowle* v. *Lawrason*, 5 Pet. 495; *Petty* v. *Fogle*, 16 W. Va. 497; *Bank* v. *Jeffries*, 21 *Id.* 504.

It is well established that, if the bill on its face shows that the specific account can be fairly determined in a court of law, and that no discovery is necessary to the relief sought, the simple fact that the bill contains vague and general statements of complications of the accounts between the parties without giving specific facts to show that such complications exist in the particular accounts to be adjusted, or a statement that the remedy at law is inadequate, or that some discovery is required from the defendant, will not support the jurisdiction of a court of equity. In such cases such statements will be considered merely as colorable and employed as pretexts for foisting a jurisdiction upon equity courts which does not pertain to them, and they will be disregarded and jurisdiction declined. 1 Story's Eq. Jur., sec. 458 *a*; *Lafever* v. *Billmyer*, 5 W. Va. 33–41; *Bass* v. *Bass*, 4 H. & M. 478.

The allegations of the bill in the case at bar, it seems to me, fail to show that the plaintiff is without adequate remedy at law, or that the facts stated entitle it to relief in a court of equity. The averments show that the plaintiff had full knowledge of the state of the accounts between it and the

defendant Reed. No facts are stated which even tend to establish that there is any complication or confusion in the accounts. It is specifically stated that the sum found to be due from the defendant Reed, on account of transactions during his first term of office was $1,088.90, and that the sum due from him, at the time this suit was instituted, was $2,190.32, and that it is this latter sum which the plaintiff is entitled to recover. There is, therefore, no uncertainty as to the state of the accounts or the amount due from the defendant Reed.

The only confusion alleged and the only matter as to which any discovery is sought, relate to the respective liabilities of the two sets of sureties on the official bonds of the defendant Reed. The facts being fully known and stated, the question as to the liability of the one or the other set of sureties, or as to the respective liabilities of both, is purely a question of law which can be as well determined by a court of law as by a court of equity. No reference to a commissioner or discovery from the defendant, Reed, can aid in the solution of this question. It is one which the court alone must solve, and the uncertainty in the mind of the counsel for the plaintiff as to which way the court may solve it, is certainly no ground for the jurisdiction of a court of equity. The fact that the defendant, Reed and one set of his sureties *claim* that the other set of sureties is liable for a specific part of the sum alleged to be due the plaintiff, does not confuse or complicate the accounts between the parties, or make a discovery necessary to a recovery by the plaintiff from the parties legally liable according to the facts alleged. I can see no ground in the allegations of the bill to sustain the jurisdiction, and am, therefore, of opinion that the decrees of the circuit court should be reversed, the demurrer sustained and the bill dismissed, which is ordered accordingly.

REVERSED. DISMISSED.

CHARLESTOWN.

EXCHANGE BANK OF VA. v. HORNER.

Submitted June 24, 1885.—Decided September 19, 1885.

1. The plaintiff in an execution may, by notice and motion under the provisions of sec. 35 of ch. 19, of the Acts of 1881 obtain judgment in the circuit court, to which, or to the clerk's office of which, such execution is returnable against an officer, although such officer may reside in a county different from that for which said court is held. (p. 443.)

2. In such proceeding the plaintiff may recover in any case, where the return of the officer on the execution shows, that the plaintiff would be entitled to recover from such officer money in any form of action. (p. 444.)

3. When the return shows that the officer had levied upon certain property and that no other property was found to levy upon, the plaintiff can only recover the value of the property so levied at the time it ought to have been sold by the mandate of the writ. (p. 446.)

The opinion of the Court sufficiently states the facts of the case.

J. M. Bennett for plaintiff in error.

John Bassel for defendant in error.

SNYDER, JUDGE:

This was a proceeding by the Exchange Bank of Virginia against James D. Horner, sheriff of Harrison county upon notice in the circuit court of Lewis county under sec. 35 of ch. 19, Acts of 1881. The notice states, that the plaintiff caused a writ of *fieri facias* to be issued from the office of the circuit court of Lewis county in its name against Caleb Boggess and John R. Boggess for $1,646.00 with interest and costs, which writ came to the hands of the defendant and he returned the same endorsed as follows: "Levied the within execution, August 27, 1881, on one law library, consisting of 300 volums as the property of Caleb Boggess. No other property found on which to levy this execution;" that then the plaintiff caused a writ of *venditioni exponas* to issue from said office

directed to the defendant, commanding him to sell the property so levied upon by him, which writ the defendant returned and endorsed his return thereon in these words: "Notice having been served upon me by one R. S. Allen claiming to be the owner of the judgement of Exchange Bank of Virginia *v.* Caleb Boggess and J. R. Boggess and forbidding me to sell the property levied upon, and I having required bond, and no bond having been given to indemnify me by J. M. Bennett who claims the right to control the judgment, I have returned this *venditioni*;" and then after stating that by reason of the failure of the defendant to sell said property the plaintiff is entitled to recover from him by action the full amount of the judgment mentioned in said writ, it notifies the defendant that, on the first day of the next term of the circuit court of Lewis county, from the clerk's office of which said writ issued, the plaintiff will demand judgment in said court against the defendant "for the principal and interest and costs in said writ mentioned with interest on the aggregate thereof at the rate of fifteen *per centum per annum* thereon from the return day of said writ until payment and costs," &c.

The parties appeared, and on the motion of the defendant the court, on March 17, 1882, quashed the said notice upon the ground that the return of the defendant set out therein was not such a return as would authorize any judgment by motion in that court, and dismissed the plaintiff's motion with costs; and thereupon the plaintiff obtained this writ of error.

It is argued for the defendant in error, that a sheriff or other officer is not to be compelled to defend an action out of his own county instituted in this summary manner, unless the return is of such a character as to show he is liable for a *certain sum of money;* and that where the recovery must be for a sum not fixed by the return or for damages, this proceeding will not lie, citing, *Chapman* v. *Chevis*, 9 Leigh. 297, and *Stone* v. *Wilson*, 10 Grat. 529.

These decisions and others in the Virginia reports are all founded upon the provisions of sec. 48, of ch. 134, Code of 1819, which in terms limits the proceedings under it to such return upon the execution "as would entitle the plaintiff to recover from such sheriff, or other officer, *by action of debt*,

the debt, damages or costs in such execution mentioned." &c.

Under that statute there never was, and never could be any doubt, that to entitled the plaintiff to recover in this summary proceeding by notice, the return must show that the officer was liable for a fixed and *certain sum*, or one that could be made certain by a simple calculation, because for such sum only would the *action of debt* lie; and the statute expressly states that the notice provided by it can be used only when an action of debt could be brought for the money mentioned in the return.

It will be observed that our present statute, under which this notice was brought, uses very different and much broader terms. It provides that, "If any officer, or deputy, shall make such return upon any * * process issued by a court or clerk thereof as entitles any person to recover money from such officer *by action*, the court to which, or to the clerk's office of which, such return is made, may, on a motion on behalf of such person, give judgment against such officer * * * for so much principal and interest as would at the time such return ought to have been made be recoverable by such action with interest," &c.—Acts 1881, p. 258; Id, Code ch. 41 sec. 30.

This statute as above quoted, was first incorporated in our laws by the revisal of 1849—see Code of Virginia 1849, sec. 40, chap. 49, p. 253; but I can find no decision of the courts of Virginia or of this State construing the statute in its present form. It seems to me, however, that the marked difference in the language of this and the former statute is sufficient to justify the conclusion that the legislature intended to change the effect of the law and to enlarge the remedy authorized by it so as to make it embrace cases not only where the return of the officer showed that he was liable for a certain sum of money such as would authorize an action of debt against him, as under the old statute, but cases where the return showed such liability as would entitle the creditor in the execution to recover money against the officer in any form of action.

The words, "so much principal and interest," used in the statute and the words following these, mean, as I understand them, that the sum for which the officer is liable, whether it

be the amount of the debt, interest and costs mentioned in the execution, or damages for which he is made liable upon the face of his return, shall be ascertained and aggregated as of the date the return was, or ought to have been, made, and then interest shall be given on this aggregate from that time at the rate of not less than six nor more than fifteen *per cent. per annum* (at the discretion of the court) until payment, the said aggregate being the principal money mentioned in the statute. If on the trial an issue of fact arises, either party may demand a jury to try it.—Sec. 8 ch. 74, Acts 1882, p. 173.

I am not unmindful that this statute, giving as it does a summary and unusual remedy, unknown to the common law, should be construed strictly and confined to cases plainly within its terms and purpose. But I am not aware of any constitutional limitation which forbids the legislature to authorize a proceeding of this character to be brought against an officer in the county from which the execution issued, although it may be in a county different from that in which the officer resides. There being no such limitation the legislature has absolute control over the subject, and it is not for the courts to interfere with its exercise.

If this may be regarded as a harsh and oppressive proceeding, its severity may be justified, at least, to some extent, by the necessity of the case. The credtior has sued once and obtained a judgment for his debt, the officer collects it and fails to pay it over, or otherwise fails to discharge his duty in regard to it and returns this fact upon the writ. It would seem to be not unreasonable that the officer who places himself in this position should be dealt with summarily. He does not occupy the position of an ordinary debtor, but that of an unfaithful and delinquent officer. In some cases he may not be in the wrong, but *prima facie* that is his situation and the burden is upon him to relieve himself. It is, therefore, more just that he should be brought to the county of the creditor than that the creditor should be compelled to sue him in the county of his residence. I, therefore, think the statute authorizes the remedy invoked by the plaintiff in this proceeding.

The return of the sheriff on the execution was, I think, at least, *prima facie* sufficient to show that the plaintiff was en-

titled to recover from the defendant the value of the library on which the levy had been made. That part of the return which states, that the sheriff had required of the attorney for the plaintiff an indemnifying bond, can not be regarded for any purpose, because there is no statute or law to authorize the giving of an indemnifying bond under such circumstances. The return simply amounts to the statement that the sheriff declined to execute the writ for the sole reason that one R. S. Allen, who *claimed* to be the owner of the debt, had forbidden him to sell the property. It is not even stated that Allen was, in fact, the owner of the debt, but merely that he so claimed. But if such had been the fact, it was nevertheless the duty of the sheriff to execute the writ if required by the attorney of record for the plaintiff. There does not appear to have been any endorsement on the execution to show that Allen had any interest in it, and, in the absence of such endorsement by the clerk of the court, it was the duty of the sheriff to treat the plaintiff in the writ as the party entitled to control it and not undertake to decide for himself that some other claimant had the right to control it and act upon his directions. Freem. on Ex. § 108. Under the circumstances the sheriff would not have made himself liable to the execution debtors by executing the writ, and therefore he should have obeyed its mandate and left the parties interested to resort to the court for a settlement of any disputes as to the right to control the writ or suspend its execution.

While the notice here demands, and as I think properly, the whole amount of the debt mentioned in the execution because the property levied upon may possibly have been sufficient to satisfy the whole of said amount, still, it is certain that the plaintiff would not be entitled to judgment for the whole of said debt if the property levied upon was of a value less than the whole, but only for so much as the said property was worth at the time it ought to have been sold as required by the writ, with interest thereon as provided by the statute from that time until payment.

I am, therefore, of opinion that the said judgment of the circuit court be reversed and the case remanded for further proceedings in accordance with this opinion.

REVERSED. REMANDED.

CHARLESTOWN.

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BUTCHER AND DUNNINGTON, TRUSTEES v. PETERSON, *et al.*

Submitted June 24, 1885.—Decided September 19, 1885.

1. Where there is a contract for a sale of several adjoining parcels of land in gross for an entire sum, and the vendor warrants the title generally, if the vendee is evicted from a portion of the land by reason of the want of title in the vendor, he may elect to hold so much of the land as he can and compel the vendor to abate the purchase-money or compensate him for the part of the land from which he has been evicted, even though the parties were mutually mistaken as to the title of the vendor to the part so lost by eviction. (p. 450.)

2. In such sale, although the sale was in gross, and neither the quantity of land was specified nor any price fixed upon the separate interests or parcels, a court of equity will by reference to a commissioner or otherwise ascertain the relative value of the portion lost by the purchaser and decree its payment by the vendor. (p. 453.)

3. The measure of compensation for the land lost in such cases, where the vendor acted in good faith and believed he had the right to sell the land, is such portion of the purchase price as the relative value of the land lost bears to the purchase-price of the whole land. (p. 454.)

The facts of the case fully appear in the opinion of the Court.

W. E. Arnold for appellants.

W. G. Bennett for appellee.

SNYDER, JUDGE:

In January, 1859, Jacob J. Jackson made his will which was afterwards duly probated in Lewis county; by the second clause of the will, the testator devised to five of his children, viz: Elizabeth, George W., Margaret Drusilla, Cecelia B. and Jacob W., the farm on which he then resided, subject to dower of his wife Pamelia F. Jackson therein, providing therein that the farm should be used for the support of said children until the youngest should arrive at the age of

twenty-one years, and that then it should be held either jointly or severally by the said children, "and in case of the death of any of them, that his or her share shall pass to their heirs in the same manner it would under the law without this devise;" that one of said children, Jacob W., died in the year 1866, intestate and without issue; another one, Margaret Drusilla, married Robert E. Bush in 1871, and died in April, 1872, intestate and without issue, leaving her husband surviving; by written contract dated February 1, 1873, John C. Jackson, also a son of said testator and half-brother of the above named devisees, sold to Jasper Peterson, and agreed to convey to him by deed with general warranty, in consideration of $6,000.00, the following property:

First.—The dower estate of the widow of said Jacob J. Jackson, deceased, set apart by decree to her in the farm aforesaid.

Second.—The undivided interest of said George W. Jackson in said farm subject to the said dower therein.

Third.—"All the undivided interest of the said John C. Jackson which descended to him on the deaths of the said Jacob W. and Margaret Drusilla, and supposed to contain about fifty-two acres, being the land of which they were seized at the times of their deaths and the same that was devised to them by their father, Jacob J. Jackson.

Fourth.—A tract of twenty-five acres adjoining the said dower land.

Fifth.—The interests which descended to George W. Jackson upon the deaths of his half-brother and sister, the said Jacob W. and Margaret Drusilla, in the farm which was devised to them by their father, Jaccob J. Jackson; and

Sixth.—The interest of said John C. Jackson in the wheat crops sown on parts of said lands by tenants. The value of these crops was shown by the proof not to exceed $8.00.

By deed, dated September 29, 1874, the said John C. Jackson and wife conveyed the aforesaid real estate to said Peterson with covenant of general warranty, retaining therein a lien to secure the payment of two bonds of $1,000.00 each for unpaid purchase-money. These bonds were assigned by John C. Jackson to G. J. Butcher and W. L. Dunnington, trustees, and in May, 1875, they brought this suit in the cir-

cuit court of Lewis county against said Peterson and John C. Jackson to enforce the payment of said bonds by a sale of the land.

The defendant Peterson answered and also filed his cross-bill, making the said Robert E. Bush a party and averring that the said Bush, as the surviving husband of said Margaret Drusilla, claimed he was the heir of his late wife and as such, under the will of Jacob J. Jackson, he was the owner of the interest which descended from the said Margaret Drusilla at her death and which was a part of the land sold and conveyed by said John C. Jackson to said Peterson. He also avered in his cross-bill that said interest so claimed by said Bush was worth at least $2,500.00 and asked that the right to said land might be ascertained, and if it should be determin- that the said Bush was entitled thereto, that the value thereof might be set off against the said bonds for the purchase money.

Before the merits of this cause were decided, a decree was entered in another cause, which was subsequently heard with this, by which it was adjudicated and determined, that the said interest of said Margaret Drusilla in said land, upon her death, passed to and vested in her husband, the said Robert E. Bush, and thereby the said Peterson lost and was judicially evicted from a portion of the land described in the third and fifth items of said contract of sale.

The cause was referred to a commissioner, and he reported that the whole land embraced in the sale and conveyance from John C. Jackson to Peterson amounted to 168 acres of dower and 134 acres in fee, and that the quantity from which the said Peterson was evicted by said Bush was forty-four acres, of the relative value of $1,443.26 upon the basis that the whole land sold was of the value of $6,000.00, the purchase price. There were no exception to this report.

On October 28, 1882, the court, being of opinion that Peterson was entitled to an abatement from the contract price of his purchase on account of the interest of Margaret Drusilla from which he had been evicted by the said Robert E. Bush, (but by reason of the equities arising between the plaintiffs, Butcher and Dunnington, trustees, and said Peterson, the latter should be required to pay to the said plaintiffs

the entire unpaid amount of said two bonds which was done,) thereupon decreed, that said John C. Jackson pay to said Peterson the said sum of $1,443.26, reported by the commissioner, with interest thereon from the date of said eviction and the costs of the suit. From this decree the said Jackson obtained this appeal.

The appellant has assigned and argued the following grounds for the reversal of said decree:

First. That the contract of sale was based upon the mutual mistake of the parties;

Second. That the sale was in gross and at the hazard of the purchaser; and

Third. That the contract embraced different subjects for an entire consideration, and there was, therefore, no way of ascertaining the abatement to be made for the portion lost by the vendee.

First.—It is insisted by the appellant that the parties were mutually mistaken as to the interest of the vendor in the land from which he was evicted by Bush; that this mistake was one either of law or of fact; if a mistake of law, no relief could be granted, and if a mistake of fact, the only relief which a court of equity could grant would be to rescind the contract of sale.

The doctrine which denies relief upon contracts entered into upon mistakes of law, so fully argued in this cause, has no application here, for the reason that the vendee is protected by the express warranty of title by the grantor. It is immaterial that the vendee had knowledge of all the facts in relation to the title, and that he accepted the conveyance or made the purchase, believing that said facts did not impair the title. When a purchaser has notice of a defect or incumbrance and requires from the vendor a warranty, the presumption of law is that the covenant was expressly taken against such known defects or incumbrances.—Rawle on Cov. Title 566; *Jackson* v. *Lizen*, 3 Leigh 161. If the purchaser had failed to contract for an express warranty, then this doctrine might apply; but to contend in the face of the positive covenant of Jackson that Peterson should be denied relief because he had knowledge of facts which in law destroys the title to a part of the land purchased, would be to

deprive him of the benefit of his warranty. The covenant of general warranty, unless qualified by the contract, in terms is a protection against defects of title whether they result from mistakes of law or mistakes of facts.

In regard to the rule upon which courts of equity rescind contracts of sale where there is a mutual mistake of the parties in entering into the contract, it is well settled, that such mistake must be of the substance of the thing contracted for; it must be such that the purchaser can not get what he substantially bargained for, or the vendor would be compelled to part with what he had no idea of selling. *Glassell* v. *Thomas*, 3 Leigh 113; *Graham* v. *Henderson*, 5 Munf. 185; *Lamb* v. *Smith*, 6 Rand. 552; *Crislip* v. *Cain*, 19 W. Va. 440, 474. But if the mistake does not affect the substance of the contract, so as to defeat the main purpose of the contracting parties, this rule has no application. In all cases courts of equity look to the substance of the contract, and do not permit small matters of variance to interfere with the manifest intention of the parties, especially where full compensation can be made on account of the loss or deficiency in the land sold. Equity will decree specific performance even in cases of executory contracts at the suit of the vendee where the vendor is incapable of making a complete title to all the land sold. The general rule in such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and have an abatement of the purchase-money, or compensation, for any deficiency in the title, quantity, quality or description of the estate. In such cases, however, the purchaser, if he elects to have such performance, can have relief only upon equitable terms. 2 Story's Eq. Jur., sec. 789; *Hill* v. *Buckley*, 17 Ves. 394; *Waters* v. *Travis*, 9 Johns. R. 465.

In the case of *Clarke* v *Reins*, the court, quoting from Lord Eldon in *Mortlock* v. *Butler*, 10 Ves. 292, 316, says: "If a man having partial interests in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent for him to say afterwards, though he has valuable interests he has not the entirety, and, therefore, the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting

under these circumstances is bound by the assertion of his contract; and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement." 12 Grat. 111; *Wood* v. *Griffith*, 1 Swanst. 43, 54.

The principles to be deduced from the foregoing and other authorities, many of which are referred to in *Crislip* v. *Cain*, *supra*, may be stated as follows: First.—When the contract is a sale in gross for an entire sum, if it is subsequently ascertained that there is either a deficiency or an excess in the quantity of the land specified therein, and it is shown that the error in quantity arose from the mutual innocent mistake of the parties, a court of equity may, where the mistake affects the substance of the sale, rescind the contract, but in the absence of fraud, actual or constructive, in either party, such court can allow no abatement for a deficiency or compensation for any excess in the land. *Hansford* v. *Coal Company*, 22 W. Va. 70.

Second.—If, however, in the case of such sale, the purchaser loses a part of the land purchased by him because the vendor had no title to the part so lost, and such part is not a substantial part of the land contracted for, then, neither the vendor nor the vendee can have the sale rescinded in a court of equity, even though the parties were mutually mistaken as to the title of the part of the land lost. But if in such case, the sale is without warranty of title and the vendee refuses to rescind the sale, he will not be decreed compensation for the land so lost. *Bailey* v. *James*, 11 Grat. 468.

Third.—But, if in the case last stated, the vendor has warranted the title, and the portion lost is much or little, the vendee may elect to hold so much of the land as he can and compel the vendor to abate the purchase-money, if unpaid, or, if paid, to make compensation for the land so lost by reason of the want of title or right in his vendor. *Att'y Gen.* v. *Day*, 1 Ves. 218; *Roffery* v. *Shallcross*, 4 Madd. 227; *Beverly* v. *Lawson*, 3 Munf. 317.

In the case at bar, the defficiency in the land sold arose from the want of title in the vendor, Jackson, to the portion lost; the sale was with warranty of title, and the vendee, Peterson, has elected to hold the portion to which Jackson has made him a good title with compensation for the portion

lost; this brings the case within the principle of the last proposition above laid down, and the circuit court did not err in so decreeing.

2.—That this was a sale in gross need not be disputed, because in such sale, as we have seen, the purchaser is entitled to compensation where the title is warranted and a portion of the land is lost by the want of title in the vendor. But it is insisted that the sale was one of hazard and the purchaser took the risk of the title. There is certainly nothing either in the contract or the conveyance to indicate any such risk, unless it is, as argued, in the use of the words, "all the undivided interest" of the vendor, John C. Jackson, "which *descended* to him on the death of Margaret Druscilla, and supposed to contain fifty-two acres." It is argued, that this language does not mean, and can not be construed to mean, the interest in the land which *belonged* to Margaret Drusilla at the time of her death, but only the interest, if any, which *descended* to appellant from her at her death; and as, in fact, no land descended to him from his sister, he sold none to Peterson; that he merely sold his *claim* to said interest and Peterson assumed the risk of getting title to it. This argument, it seems to me, is too untenable for serious refutation. It is contradicted by the whole tenor of the contract and the deed; and in the subsequent part of the same sentence of the contract, it is stated to be "the land of which" the said Margaret Drusilla was "seized at her death, being the same devised to her by the will of her father Jacob J. Jackson." It is entirely plain that the sale embraced the interests which the appellant claimed to own in the land of which his said sister died seized, and not his mere claim to said interests. The language thus relied on as a qualification of the sale, was employed simply as descriptive of the land sold, and it does not even tend to establish that Peterson took the risk of the title to it. This view is made conclusive by the fact that Peterson required from the appellant an express warranty of the title to all the land purchased without any exception or qualification.

3.—It is insisted by the appellant that, as the sale here was in gross, for an entire consideration, of different tracts of land, a part of which was in fee and part a dower estate with

wheat crops thereon, and as no price was fixed on the separate parcels and the number of acres are not given, it is impracticable to ascertain the value of the land lost, and for that reason a court of equity will deny relief in the form of compensation. The repeated decisions of the courts of Virginia and of this State negative the correctness of this proposition. It is certainly no more impracticable to ascertain the value of a portion of an entire tract than it is of a portion of several adjoining tracts. The so-called wheat crops on the land here are shown to be of so little value—not exceeding $8.00, that they may be eliminated from the present enquiry.

In *Clarke* v. *Hargrove*, 7 Grat. 399, the plaintiff had purchased from the defendant 1176 acres of land at the price of $11,000; after the land had been conveyed by deed with general warranty of title it was found that the vendor had no title to fifty-one acres of said land; held by the appellate court, reversing the circuit court, that the plaintiff was entitled to compensation for the fifty-one acres lost according to the relative value of the same to the whole tract. *Koger* v. *Kane*, 5 Leigh 606.

Renick v. *Renick*, 5 W. Va. 285, was a case of the sale of sundry tracts of land for an entire sum; neither the quantity of the land was specified in the contract of sale nor the value or quantity of any separate tract fixed; one of the parcels embraced in the sale was not owned by the vendor; the courts held that the vendee was entitled to an abatement of the purchase money on account of the loss of said parcel. The principles announced in the following cases fully recognize the doctrine of these cases. *Johnston* v. *Jarrett*, 14 W. Va. 230; *Depue* v. *Sergent*, 21 *Id.* 326; *Anderson* v. *Snyder*, *Id.* 632.

It is the settled law of this State that, where there is a sale of land with covenant of general warranty, and the purchaser is evicted by a third person holding a paramount title, the measure of damages to which the purchaser is entitled, where the vendor sold in good faith and without fraud, is the purchase money paid for the land with interest thereon from the date of the actual eviction. *Threlkeld* v. *Fitzhugh*, 2 Leigh. 451; *Stout* v. *Jackson*, 2 Rand. 132; *Lowther* v. *The Commissioner*, 1 H. & M. 202; *Thompson* v. *Guthrie*, 9 Leigh 101.

The same rule obtains when the eviction is of only a part of the land sold. In such case the measure of damages is, such a portion of the purchase money as the relative value of the land lost bears to the price of the whole land. *Humphreys* v. *McClenachan*, 1 Munf. 493.

The decree of the circuit court, as I understand it, conforms in all respects to the principles announced in the foregoing opinion, and it must therefore be affirmed.

AFFIRMED.

CHARLESTOWN.

HEARD v. C. & O. RAILWAY CO.

Submitted September 14, 1885.—Decided September 19, 1885.

1. The rule for determining what facts shall be considered as established in cases of demurrer to the evidence, when all of it is adduced by the demurree is, the court shall regard the demurrant as necessarily admitting by his demurrer not only the credit and truth of all the evidence but all inferences of fact that may be fairly deduced from it; and in determining the facts inferable from the evidence, inferences most favorable to the demurree will be made in cases where there is grave doubt which of two or more inferences shall be drawn. Unless there is a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made in his favor. (p. 457.)

2. If the evidence is such, that the court ought not to set aside the verdict of a jury in favor of the demurree, then upon a demurrer to that evidence the court should give judgment against the demurrant. (p. 458.)

3. A case in which the judgment of the circuit court. sustaining the defendant's demurrer to the plaintiff's evidence in an action for negligently killing the plaintiff's mule by the train of the defendant, is reversed by this Court and judgment given for the plaintiff for the damages found by the jury. (p. 459.)

The facts of the case appear in the opinion of the Court.

E. W. Wilson for plaintiff in error.

J. H. Ferguson for defendant in error.

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SNYDER, JUDGE:

This action was commenced December 1, 1882, before a justice of Kanawha county by W. B. Heard against the Chesapeake and Ohio Railway Company to recover the value of a mule alleged to have been negligently killed by the defendant. The justice rendered judgment in favor of the plaintiff for $150.00, and the defendant at once took the case by appeal to the circuit court of said county wherein there was a trial *de novo* by jury which found a verdict in favor of the plaintiff for $125.00, subject to the judgment of the court on the defendant's demurrer to the evidence. The court, on April 4, 1883, pronounced judgment for the defendant on the demurrer to the evidence, to which the plaintiff excepted and obtained this writ of error.

The only question presented here is, whether or not the court erred in sustaining the defendant's demurrer to the evidence. The defendant offered no evidence and the substance of that adduced by the plaintiff is as follows: A little after daylight on a day of the last of August or first of September, 1882, as the passenger express train of the defendant was passing over its road going east at a speed of thirty miles an hour, the train struck and killed the plaintiff's mule about 150 yards above Paint Creek depot in Kanawha county. The road, in the direction from which the train approached the place where it killed the mule, was straight and the mule could have been seen from the train 500 or 600 yards before it was struck. No signal was given, nor whistle sounded, and the train did not check up or stop either before or after striking the mule. One witness testified: "I saw the train kill the mule. I saw it just as the train struck it right at the spring. Train was between me and mule. Spring is about three feet from railroad track—on side of track that the spring is, there was a bank and fence. The bank was three feet high and slanting. When I saw it, it appeared to be trying to get away; it was trying to go up the bank. I did not see the mule on the track. It was by the side of the track just as the train caught it. It was the side of the train that struck it. Piece of step of passenger coach was torn off by the mule. Just as I discovered the mule the train was right on it. That was the first I saw of the mule. I was on the

river side of the track, but in front of place where the mule was struck. The mule was on hill-side of the track. I was about forty yards from where it was struck. Went right to it. It was killed immediately—it was broke all to pieces." Another witness testified that he was an employe of the defendant; that he did not know what train killed the mule; made a report of finding this mule to the division master of defendant. He thought the fast train could be stopped in a distance of 200 yards. "The spring referred to by other witness is six or seven feet from track on side next to hill on a level with the track. There is a fence up the hill about ten or fifteen feet off. The mule's neck was broken close up to his shoulder—the head was lying next to the bank, and the other part next to the track. There was six or seven feet between the rail nearest the bank and the bank."

The foregoing is all the evidence bearing on the question of negligence in the record; and it seems to me, that it was sufficient to warrant a verdict for the plaintiff. The rule in cases of demurrer to evidence where there is no conflict in the evidence as in this case is, that the demurrant by his demurrer necessarily admits not only the credit of the evidence demurred to but all inferences of fact that may be fairly deduced from it, and in determning the facts inferable from the evidence, inferences most favorable to the demurree will be made in cases where there is a grave doubt which of two or more inferences shall be drawn. In such cases it is not sufficient, that the mind of the court should incline to the inference favorable to the demurrant, to justify it in making that inference the ground of its judgment. Unless there be a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made. The demurrer withdraws from the jury, the proper triers of facts, the consideration of the evidence by which they are to be ascertained; and the party whose evidence is thus withdrawn from its proper forum is entitled to have it most benignly interpreted by the substitute. He ought to have all the benefit that might have resulted from a discision of the case by the proper forum." If the facts of the case depend upon circumstantial evidence, or inferences from facts or circumstances in proof, the verdict

of a jury ascertaining these facts would not be set aside, merely because the court might have made inferences different from those made by the jury. To justify the granting of a new trial, when it depends on the correctness of the decision between different interences to be drawn from the evidence, it would not suffice that in a doubtful case the court would have made a different inference. The proponderance of argument or probability in favor of this different inference should be manifest. When the question is, whether or not a fact ought to be taken as established by evidence, either directly or inferentially, in favor of the demurree, I do not know a juster test than would be furnished by the enquiry, would the court set aside the verdict, had the jury, on the evidence found the fact? If the verdict so finding the fact would not be set aside, it ought to be considered as established by the evidence demurred to."— *Ware* v. *Stephenson* 10 Leigh 155, 164, Stanard, J; *Front* v. *Va. & Tenn, R. R. Co.*, 23 Grat. 619 638.

Following the quotation above given, Stanard, J. says: "In the case in judgment, the *evidence was all parol and adduced by the plaintiff*. In ascertaining the facts established by it, we must look to all of it, and especially in ascertaining the facts established by any one witness, everything stated by him, as well on his cross-examination as on his examination in chief, must be considered. Facts imperfectly stated in answer to one question may be supplied by his answer to another; and when from one statement considered by itself an inference may be deduced, that inference may be strengthened or repelled by the facts disclosed in another." 10 Leigh 165; *Allen* v. *Bartlett*, 20 W. Va. 46.

In the case at bar, as in *Ware* v. *Stephenson* from which the above quotations have been made, the evidence is all parol and all of it was adduced by the plaintiff. This similarity in the two cases, makes the discussion of the rules applicable to such cases and the principles governing them contained in that case peculiarly applicable to this case. Considering the evidence, hereinbefore given, in the light of those rules and principles, is it not manifest that the jury would have been justified in finding that the plaintiff's mule was killed by the negligence of the defendant? If the jury had found

a verdict for the plaintiff, would the court have been authorized to set it aside? If either of the questions can be answered in the affirmative then the circuit court erred in sustaining the defendant's demurrer to the evidence. Giving the demurree, the plaintiff in error here, the benefit of the most favorable construction of his evidence and all the inferences from it which are not overcome by a decided preponderance of probability against such inferences, as required by the rules just stated, it seems to me, both of said questions should be answered in the affirmative. The mule could have been seen 600 yards from the place where it was struck by the defendant's agents in control of the train. Whether or not they saw the mule is immaterial. It was their duty to have done so. *Baylor* v. *B. & O. R. R. Co.*, 9 W. Va. 270. The mule was between the railroad tract and a bank three feet high with a fence on top of it. The space between the track and the bank was only from three to seven feet wide, of which the projection of the train would cover probably three feet, leaving at most but four feet for the mule to stand on while the train, composed of the locomotive, tender, two baggage cars and four passenger coaches, was passing it at a speed of thirty miles per hour. The most ordinary prudence would have indicated that it would be extremely improbable, if not impossible, to pass the mule so situated and confined with such a train at the speed it was then running without striking the mule. When struck the mule was trying to get up the bank out of the way of the train. The space between the bank and the train was, evidently too narrow to permit the train to pass without striking the mule. The mule was doing its utmost to avoid the train. Under all the circumstances it used more care and less recklessness than the agents of the defendant. It was trying to escape, while they, in full view of the situation, ran the train against it without making any signal or using any precaution whatever. They neither checked nor stopped the train either before or after striking the mule. It is not positively shown where the mule was from the time the train first came in sight of it until it was struck, but the jury might have reasonably inferred from the facts proved, that it was either on the track or on the side of the track where it was when struck. The fair inferences and

probabilities are that the situation was such, that no competent agent of the defendant in the exercise of due care would have attempted to run the train by the mule in the reckless manner it was done in this instance. The whole case, it seems to me, shows not only an entire want of due care on the part of the agents of the defendant but gross negligence. *Blaine* v. *C. & O. R. R. Co.*, 9 W. Va. 252; *Washington* v. *B. & O. R. R. Co.*, 17 *Id.* 190; *Johnson* v. *Railway Co.*, 25 *Id.* —; Redf. Am. R'y Cas. 255–6.

I am clearly of opinion that the judgment of the circuit court is erroneous and should be reversed; that on the defendant's demurrer to the evidence the judgment should be entered by this Court for the plaintiff for the damages found by the verdict of the jury, and it is accordingly so ordered.

REVERSED.

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CHARLESTOWN.

TITCHENELL *v.* JACKSON AND FEATHER.

Submitted June 12, 1885.—Decided September 19, 1885.

1. If the language of a written agreement is on its face ambiguous, the courts will look at the surrounding circumstances, at the situation of the parties and the subject-matter of the contract, and at acts done by the parties under it for aid in giving a construction to its language, but not to the verbal declarations of the parties. (p. 469)

2. If a conveyance be made by A. to B., and at the same time and as a part of the same transaction B. executes a written paper, wherein he declares, that he purchased the land in trust for C., this constitutes an executed and express trust, and as such it is valid, though C. gave no consideration whatever for being thus made the *cestui que trust*. If B. afterwards conveys this land to D., who has notice of this trust, a court of equity will set aside such conveyance as fraudulent. (p. 472.)

3. A decree between co-defendants can only be based upon the pleadings and proofs between the complainant and defendants. (p.476 .)

GREEN, JUDGE, furnishes the following statement of the case:

At the July rules, 1882, Michael S. Titchenell filed his bill in the circuit court of Preston county against Charles W. Jackson and Joseph Feather, in which he stated, that Charles W. Jackson had obtained a judgment in the circuit court of Preston against him and then instituted a chancery suit in said court to subject his farm of fifty acres in said county to the payment thereof, and obtained a decree ordering the sale of said land to pay said debts and the costs of the chancery suit. The terms of sale were enough money in cash to pay the costs ($57.49) and the balance in three instalments with interest from date, payable in six, twelve and eighteen months. This land, the bill alleges, was worth $800.00. Joseph Feather agreed to bid in the land for the plaintiff for the amount of the debt and costs of suit, for which the land was sold; and he did so, it being knocked down to him at the public sale by the commissioner for that amount ($180.50.) The understanding between him and Feather was reduced to writing at the time and signed by Feather. A copy of it was filed with the bill and is as follows:

"Joseph Feather has this day bought in the land of M. S. Titchenell for the sum of $180.50, and he agrees that if the said M. S. Tichenell will pay the purchase-money notes as they become due, and shall pay the costs of said suit, which amounts to $52.49, and interest, by January 1, 1881, then the said Feather agrees *to let the said Feather agrees* to let the said Tichenell have the said land and will make him a good title therefor at the costs and charges of said Titchenell.

"Witness my hand and seal this September 6, 1880.

"JOSEPH FEATHER, [——.]"

The bill alleges that pursuant to this agreement the plaintiff paid most of said costs before January 1, 1881; and being sick Feather agreed that he might pay the balance of the costs as the notes for the purchase-money fell due; but before they all fell due Feather conveyed said land to said Jackson with the understanding that the plaintiff, Titchenell, could pay said Jackson and have the land on the same terms, on which he was to have it from Feather. The bill expressly alleges, that Jackson, before he purchased said land

and had it conveyed to him by Feather, knew of the agreement aforesaid between Titchenell and Feather. After Jackson got his deed for this land, the bill alleges, he got a writ of possession and turned the plaintiff out of the possession of his farm. The bill has in it many matters foreign to the case, but the foregoing are substantially the material allegations. It concludes thus: "In consideration of the premises, your orator asks your honor to cancel and annul the alleged contract and sale and conveyance of said Feather to said Jackson, the same having been, as your orator is advised, in violation of your orator's rights, and is, as your orator alleges, a fraud upon him; and that your honor decree, that your orator have the privilege of paying for said land in pursuance of the agreement between him and Feather, and when your orator shall have so paid for said land, that your honor decree the title thereof to him; and to that end that your honor decree, that a deed be executed to your orator for said land and give to your orator such other and further relief, as to him in equity belongs, or as the nature of his case may require."

This bill was taken for confessed as to Feather; but Jackson filed an answer, which was replied to generally. He states in his answer, that it is true, that in the chancery suit named in the bill there was a decree to sell this fifty acres of land belonging to the plaintiff to pay the debts of the respondent, and that Feather bought it; and that "while the respondent was not advised at the time how the same was purchased, he has learned, that said Feather for the express purpose of aiding the plaintiff purchased said tract of land and gave the plaintiff the paper signed by Feather, which is filed with the bill." This answer denies that the plaintiff ever paid to any one any part of the purchase-money of this land.

Many depositions were taken and they were to a considerable extent contradictory. They proved in my judgment, in addition to the facts admitted by the pleadings, that this tract of fifty acres of land was worth somewhat over $400.00; that Titchenell never complied with his agreement to pay Feather the $52.49, the cash payment which he was to pay before January 1, 1881, nor did he meet any of the purchase-money notes named in the memorandum signed by Feather, dated September 6, 1880, nor did he ever pay any part of

these costs or of these purchase-money notes; that on the day of sale Feather bid in this land for the plaintiff, Titchenell, for $180.50, and complied with the terms of sale paying $52.49 in cash and giving his three bonds for $46.00 each, with interest from date, payable in six, twelve and eighteen months, which bonds were signed by Titchenell as security. Feather knew nothing whatever about this land never having seen it, and bought it in for Titchenell at his request and simply for his accommodation. He (Titchenell) was a very poor man and lived upon this fifty acres of land with his family as their home and continued to do so, till he was dispossessed by the writ of possession issued by Jackson after he had bought the land and obtained a deed from Feather. Titchenell paid no rent for the land to Feather for the year he remained in possession of it after the sale. When Jackson had got his deed for this land from Feather, the commissioner of sale, Payne, surrendered the purchase-money notes to Feather, regarding them as so much cash paid by Jackson to him, as the proceeds of these notes were coming to Jackson. When Jackson purchased this land of Feather and obtained a deed therefor, he knew, that it had been purchased in at the public sale by Feather for Titchenell, and Payne, the commissioner of sale, had, before Jackson made this purchase, shown him the memorandum signed by Feather at the time of the public sale. This memorandum was drawn by Payne and by him kept.

There was much evidence taken with reference to matters foreign to the merits of the case, as I consider them, which need not therefore be stated.

This being substantially the case as admitted by the pleading and proven by the evidence, the court on April 19, 1883, rendered the following decree:

"At a circuit court held for the county of Preston on April 19, 1883, this cause came on this day to be heard upon the bill of the plaintiff, process duly executed upon the defendants, the bill taken for confessed as to the defendant Feather, answer of defendant Jackson filed, general replication thereto, exhibits filed, and depositions of witnesses taken, and was argued by counsel.

"On consideration whereof, it is adjudged, ordered and

decreed that the deed executed on the 13th day of September, by the defendant Joseph Feather to the defendant Charles W. Jackson be and the same is hereby set aside and held for naught. And it further appearing to the court that the said plaintiff upon the payment of the purchase-money mentioned in the contract filed with plaintiff's bill as Exhibit No. 1 to the defendant Joseph Feather, to-wit, the sum of $208.83, being the aggregate of said purchase-money and interest to this date, which is hereby declared to be a lien upon the said tract of land, will be entitled to a conveyance from the said Feather of the fifty acres of land mentioned in the plaintiff's bill. It is therefore further adjudged, ordered and decreed that upon the payment of said lien, said defendant Feather shall execute and deliver to the plaintiff a deed with covenants of general warranty for the said tract of fifty acres of land, with area and boundaries as described in the deed from said Feather to said Jackson, dated September 13, 1881, within sixty days from the payment of the said lien aforesaid; and in case he fail or refuse so to do, that Joseph H. Hawthorne, who is hereby appointed a special commissioner for the purpose, shall execute and deliver to the said plaintiff a deed, with areas and boundaries aforesaid, for the said land, which shall operate to convey to the said plaintiff the title of the said Feather acquired by him by his said purchase of said land on September 6, 1880, for which said commissioner shall be allowed a fee of $3.00, to be paid by said Tichenell. And it further appearing to the court that the said plaintiff has been turned out of the possession of said land since his said purchase of the said Feather on September 6, 1880, by the said defendant Jackson, who subsequently purchased said land of said Feather, it is further adjudged, ordered and decreed that upon the payment by the plaintiff to the said Feather of the lien aforesaid, that the said plaintiff may have a writ of possession to cause him to have possession of the said land. It is further adjudged, ordered and decreed that the plaintiff recover against the defendant Joseph Feather his costs therein."

From this decree the defendants, Feather and Jackson, obtained an appeal and *supersedeas*.

There is appended to this record though not properly a

part of it a writ of possession issued by the plaintiff, Titchenell, under this decree, which recites that he, Titchenell, had paid the $208.83 with interest, as appeared from a paper filed in the cause. On this writ was endorsed a return, that it had not been executed because of the *supersedeas* to said decree, which had been granted.

P. J. Grogan and *Guy R. C. Allen* for appellants.

Berkshire & Sturgiss for appellee.

GREEN, JUDGE:

The counsel for the appellants has argued this case, as though the question presented by the record was, whether a court of equity would specifically enforce the contract entered into by Joseph Feather with Michael S. Titchenell on September 6, 1880; and he argues, that it should not be specifically enforced, first, because it is not mutual; second, because it is too uncertain for specific enforcement; third, because it should be regarded as *nudum pactum* there being no consideration on the part of Titchenell, and therefore it can not be specifically enforced in his favor; and fourth, because the plaintiff below has entirely failed to perform his part of the contract, as is distinctly admitted by the decree of the court below in his favor. On the other hand the counsel for the appellee, the plaintiff below, have argued this case, as if the question before us was, whether the deed for the fifty acres of land made by the commissioner of the court, John Barton Payne, to Joseph Feather was, as it purports to be on its face, an absolute deed or a mortgage; and whether the contract made by Feather with Titchenell was a conditional sale of this tract of land, or whether by it Feather agreed to hold the legal title to the land simply to secure the payment to him of the $52.50, the cash paid by him on the day of sale, and as a further security for his indemnity, in case he should have to pay any of the three notes of $46.00 each, which he that day executed for the purchase-money of this land, together with Michael S. Titchenell, he standing, it is insisted, as the security of Titchenell in these notes, though the transaction, so far as the vendor, the commissioner, is concerned, took the form of

a purchase by Feather and the giving of these notes by him for the land with Titchenell as his security.

It seems to me, that the real question involved in this case is not, whether the plaintiff has a right to have the contract specifically enforced, or whether the transactions between the plaintiff and Feather make the absolute deed to Feather a mortgage, but whether these transactions did not make Feather, when he took the deed from Payne, the commissioner, a trustee for the plaintiff Titchenell, and whether he did not violate this trust, when he conveyed this land to the defendant, Jackson; and whether Jackson, when he took such conveyance from the trustee Feather, did not take it in bad faith; and whether the deed from Feather to Jackson should not therefore be declared fraudulent and void; and whether the trustee, Feather, should not be required upon the payment to him of all the moneys he had advanced and on the payment of all the moneys for which he was bound as surety for the plaintiff, to convey this land to the plaintiff. This, it seems to me from the final decree rendered in the cause by the court below, is the view which that court took of the case. If he were such trustee, then the final decree of the circuit court must be affirmed, otherwise it must be reversed.

In deciding this question it becomes necessary to decide whether any parol testimony can be considered in determining it.

It is obvious, that if this deed on its face had been to Feather for the use of Titchenell, it would have been an executed and an express trust, which would have been valid, though it had been a mere gratuity to Titchenell. In fact a deed in this form would have been nothing but the usual mode anciently of creating a use, which by the English statute of uses would have been executed and the legal title at once invested in the *cestui que* use, Titchnell. Under our statute of uses however the legal title would not have been so transferred to the *cestui que* use, Titchenell; but the vendee Feather would have held the legal title in trust for the use of Titchenell, just as he would have done prior to the statute of uses. It would not in the least alter the case, if when the purchase was made a memorandum in writing had been executed

by the nominal purchaser, Feather, whereby he declared, that the land purchased was for the use of Titchenell, though, when the deed was executed to him, there had not been inserted in it the provision, that it was conveyed to Feather for the use of Titchenell. It would be entirely immaterial, whether the declaration of such use was made on the face of the deed or in such separate paper executed by the nominal purchaser of the land at the time of the purchase; and in such a case, as when the declaration of use was made on the face of the deed, it would be totally immaterial, whether the *cestui que trust*, Titchenell, had or had not given any consideration for his position as *cestui que trust*.

While as a general rule parol evidence can not be admitted to vary or add to a written contract and especially a contract for a sale of land or a deed conveying land, there are however some cases, which are sometimes called exceptions to the general rule, though really not exceptions, being cases to which this rule is not properly applicable. Thus, if the grantee has fraudulently taken a deed in his own name instead of in the name of another, this fact may be proven by parol evidence, and when proven, it would constitute him a trustee of such other person in the view of a court of equity as effectually, as if the land on the face of the deed had been conveyed to him for the use of such other person. So if lands are purchased with the funds of A., and the absolute deed taken in the name of B., a court of equity would hold on the parol proof of these facts, that A. was but the trustee of B. as much, as if it had been so declared on the face of the deed. So if the scrivener had made a mistake in drawing the deed, it would be corrected by a court of equity on such mistake being clearly proven by parol evidence. So too a deed absolute on its face may be shown by parol evidence to have been given as security for a loan or as security for the payment of a precedent debt. In all these cases the real office of parol evidence is not to vary the deed or contract in writing, but to establish the existence of collateral facts, which when established control the deed or written contract. In like manner, if a party obtained a deed or devise without any consideration upon a parol assurance by the grantor or devisee, that he will hold it for certain uses, he will be regarded by a court of

equity as holding the land as a trustee for such purposes, and that too though in case of a deed it was declared on its face, that it was made for a valuable consideration. In such cases the deed or will is not added to or altered by parol evidence; but this evidence fastens on the individual, who has obtained the title without consideration, the personal obligation of fulfilling the trusts, by the promising to fulfil which he procured the title. But if the land was conveyed for a mere nominal consideration, a court of equity would not admit parol evidence to prove, that the grantee agreed to hold the land for the use of the grantor as such parol evidence would defeat the very purpose, for which the deed was made and would thus violate the general rule above laid down.

The seventh section of the English Statute of Frauds, 29, Car. II., ch. 3, enacts that all declarations and creations of of trust or confidence in any lands, tenements or hereditaments "shall be manifested and proved by some writing signed by the party, who is by law to declare such trust, or by his last will in writing." This section, or a section very similar to it, has been enacted in at least nineteen States, and constitutes a part of their statute of frauds. On the other hand it has been omitted from the statute of frauds in at least ten States including Virginia and West Virginia.

Where this seventh section of the English statute of frauds has been enacted, it is held that trusts in land can not be proven by parol; and where it has not been re-enacted, the decisions on this point have been variant. In Virginia and in West Virginia there have been no decisions as to whether the omissions of this section of the English statute of frauds has really made any difference in effect. There have been, however, some *obiter dicta* on this point. (*Bank of United States* v. *Carrington et al*, 7 Leigh 566; *Walraven* v. *Lock et al*, 2 Peter & Heath R. 547; *Sprinkle et al.* v. *Haycorth et al*, 26 Grat. 384; *Troll* v. *Carter*, 15 W. Va. 580–582.) In this last case I express the opinion, that a grant can not be affected with an oral trust for a third person, merely because there was a parol contract, that it should be so affected. But this was confessedly an *obiter dictum*, the court declining in that case to decide this point. The whole subject is fully considered in that case; and all the views I have above ex-

pressed are fully sustained by it and by the numerous authorities cited therein. But as in that case we deemed it unnecessary to decide whether a trust would be imposed on real estate in favor of a third person, when no fraud was proven, simply by parol proof that there was a contract that such trust should exist, so in this case we decline to determine this question, as its decision is, we think, unnecessary. For in this case it is not proposed to impose on the land named in the bill a trust in favor of the plaintiff below simply on parol evidence of a contract or agreement to that effect but on a written memorandum signed by the grantee at the time this land was purchased. It is true, that this memorandum is on its face ambiguous, and unaided by any parol evidence it would be if not uninteligible at least so doubtful in its meaning, that it could not be deemed a declaration of a trust in favor of Titchenell; but it may be regarded as well settled, that when the language of a written agreement is susceptible of more than one interpretation, that is to say, is on its face ambiguous, the courts will look at the surrounding circumstances existing when the contract was made, at the situation of the parties and the subject-matter of the contract, and will even call in aid the acts done by the parties under it as affording a clue to the intention of the parties; but the court never resorts in such a case to the verbal declaration of the parties either before, at the time or after the execution of the contract to aid it in giving construction to its language. (*Crislip, Guardian, &c.* v. *Cain*, 19 W. Va., 441, pt. 13 of syl. and the numerous authorities cited on pages 483 and 484.

Applying the rule here laid down to the memorandum or agreement dated September 6, 1880, executed by Joseph Feather, I think there is no difficulty in construing it, though on its face unaided by parol evidence of the situation of the parties, the circumstances surrounding them when this memorandum or contract was signed, and their conduct subsequently in carrying it into effect, it would be ambiguous. All ambiguity in this memorandum may be removed by this character of parol evidence, though all the verbal declarations of the parties as to its meaning are excluded, as indeed they must be. In fact in this case, if such verbal declarations were

received, so far from aiding us in the interpretation of the contract they would only tend to render it the more ambiguous, as these verbal declarations are in their character contradictory.

What by the parol evidence was the situation of the parties and the circumstances surrounding them, when this memorandum was signed, and what their subsequent conduct in carrying it out? A chancery suit had been instituted in the circuit court of Preston county to subject a tract of land of about fifty acres owned by Michael S. Titchenell in said county to the payment of a debt. This debt, interest and the costs of the suit amounted on September 6, 1880, to about $180.00, of which $52.50 was costs. This tract of land was worth not less than $400.00, and it had been decreed to be sold at public sale at the court-house in Preston by J. Barton Payne, commissioner, to pay this debt. While the sale was being made, the plaintiff in the chancery suit by the advice of the commissioner of sale, who, I presume, was his counsel in this cause, bid for this fifty acres of land the amount of his debt, interest and costs ($180.00.) This being really considerably less than half its value Titchenell, the owner of the land, asked Joseph Feather, who was present at this sale, to bid for the land for him; and though Feather did not want it he did so, bidding for it fifty cents more, and it was knocked down to him. He then made the cash payment on this land to Payne, the commissioner of sale, being the costs, $52.50, and gave his three bonds with Titchenell as his security for the balance of the purchase, which was payable in three equal instalments in six, twelve and eighteen months with interest from date. At the same time Payne drew up this memorandum dated September 6, 1880, and it was signed by Feather and kept by Payne. This is the memorandum which is to be interpreted. Titchenell remained in possession of the land and cultivated it paying no rent therefor, no rent being charged for its use. At the circuit court of Preston this sale being reported by the commissioner to the court as a sale of the land to Feather, and that he had complied with the terms of sale, there being no exception to his report, the sale was confirmed and a deed was ordered to be made to Feather by the commissioner, the vendor's lien to be reserved

as security for the future payments. This deed was accordingly made, and Titchenell having failed to repay to Feather the $52.50, the cash payment on this land, or either the first or second of the deferred payments of about $46.00 each, both of which had become due, Feather sold the land to Jackson and executed a deed conveying it on September 1, 1881.

These being the material facts, it seems to me, that in the light shed by them there is no sort of difficulty in interpreting the memorandum signed by Feather. It begins in these words: "Joseph Feather has this day bought in the land of M. S. Titchenell for the sum of $180.50." The meaning of this preamble is evidently that Joseph Feather at the public sale just made had bought of the commissioner, who wrote this memorandum, this fifty-acre tract of land owned by Michael S. Titchenell for $180.50, and had bought it for Michael S. Titchenell and not for himself. This is what is meant by the words "bought *in* the land of M. S. Titchenell for $180.50." This memorandum then proceeds, "and he (Joseph Feather) agrees that if the said Michael S. Titchenell will pay the purchase-money-notes, as they become due, and shall pay the costs of said suit, which amount to $52.49, and interest by January 1, 1881, then the said Feather agrees to let the said Titchenell have the said land and will make him a good title thereto at the costs and charges of said Titchenell."

The preamble of this memorandum shows, as we have seen, that this tract of land was bought for Titchenell by Feather; and therefore, as we have seen, Feather became by this purchase a trustee holding the legal title to the land for the use of Titchenell; and, that the parties regarded themselves as holding this relation to each other, is distinctly shown by the fact, that Titchenell occupied this tract for a year thereafter without being charged any rent therefor, and by the further fact, that he Titchenell permitted this sale of his land at less than one-half of its value to be confirmed by the court without making any exception to the sale because of the gross inadequacy of the price, at which it was sold.

This being then the obvious relation of the parties to each other as understood by both of them, the rest of the memorandum interpreted by these circumstances amounts to this,

that Titchenell would repay to Feather within three months the $52.49, which he had that day paid for him to the commissioner of sale, and would pay off the three notes of about $46.00 each, which Feather had executed for the deferred payments with Titchenell nominally as his surety; and to indemnify him for the $52.49, which he had paid for Titchenell and to indemnify him against loss by reason of his having executed the three notes of $46.00 each as surety for Titchenell, the legal title to this land would be conveyed to Feather, who would re-convey it to Titchenell on his re-paying the money paid for him and paying off the purchase-money notes.

This being the obvious meaning of this memorandum or agreement, it is obvious, that though Titchenell failed to pay the $52.49 to Feather on January 1, 1881, or failed to meet each of the deferred payments on the land, as they fell due, it would not operate in a court of equity as a forfeiture of his equitable title to the land, which was worth probably ten times the amount of any one of these payments, the failure to meet which promptly at a certain time was, as it is claimed, to work such forfeiture. This is not only the law, as it has always been recognized by courts of equity, who never enforce forfeiture, but it was obviously the law as understood by the parties to this agreement. For though Titchenell had failed to pay to Feather the $52.49 he had paid for him before January 1, 1881, yet Feather permitted him for a long time thereafter to hold possession of the land, as though he was the owner thereof, and does not appear to have thought, that he had by this failure forfeited all his right to the land till some nine months thereafter.

My conclusion therefore is, that Feather was but the trustee holding the legal title to this land, first to repay himself this $52.49 which he had paid for Titchenell and thus to indemnify himself for any loss by reason of his having signed with Titchenell the three notes of about $46.00 each, and then for the use of Titchenell.

In violation of this trust Feather on September 13, 1881, sold and conveyed this land to Jackson for, it is presumed, the price, for which it had been knocked down to him at the public sale on September 6, 1880, with the interest then due thereon, that is, $180.50 with interest from September 6,

1880, though what was the price paid for this tract of land by Jackson does not distinctly appear, nor is it at all important. The record shows distinctly, that when this sale and deed were made to Jackson, he had notice, that his grantor, Feather, was but a trustee, and that Titchenell was the equitable owner. This is distinctly and positively alleged in the bill. The language of the bill is: "Your orator alleges and charges, that said Jackson knew of the contract between the plaintiff and Feather as aforesaid, when and before he purchased said land, if purchase it he did, and received a deed therefor from said Feather." This distinct allegation in the bill is not denied by Jackson in his answer, and must therefore be regarded as true. All that Jackson in his answer says on this subject is: "When the tract of land in the bill mentioned was sold by the commissioner of the court, the said Joseph Feather purchased the same, and while respondent was not advised at the time how the same was purchased, he has learned that Feather, for the express purpose of aiding the plaintiff, purchased the said tract of land and gave the plaintiff a paper signed by him, a copy of which is filed with the bill." The bill distinctly alleges, as stated above, that Jackson had this definite knowledge of the character of the purchase by Feather, before he purchased and procured the deed from Feather. This knowledge is thus distinctly admitted by Jackson in his answer; and while he does not expressly admit, that he heard it prior to September 13, 1881, when he accepted the deed from Feather, yet he utterly fails to state, when he acquired this knowledge, and does not pretend to deny, that it was prior to September 13, 1881, when he took the deed. We must regard therefore the allegation on this subject above quoted from the bill as admitted in the answer. If it had not been, we think it was clearly proven by the evidence taken in the case.

Titchenell deposes, that Jackson was present, when this memorandum or agreement was signed by Feather, and made suggestions in relation to it, while Payne, the commissioner of sale, was drawing it up. Jackson in his deposition denies, that he was present, when this memorandum or agreement was signed. Feather says, he does not remember, whether Jackson was present or not; and Payne, who drew up the

paper, and who was, it is presumed, then as now counsel for Jackson, is silent on the subject. But Jackson in his deposition admits, that Payne told him of this arrangement between Titchenell and Feather and showed him this memorandum or agreement. This conversation, he says, was either in the spring or fall of 1881. But it was obviously before the deed was made to him; for he says, that Payne then told him, that no part of the purchase-money notes had been paid, and when this deed was made to him these notes were paid and cancelled, as stated by Payne in his deposition.

The purchase, therefore, of this land by Jackson of Feather, the trustee, with full and definite knowledge, that Feather was not the equitable owner, but that Titchenell was the equitable owner, was a fraud upon Titchenell; and the circuit court of Preston did not err in its decree of April 19, 1883, in setting aside and holding as naught this fraudulent deed. Nor did it err to the prejudice of the appellants in declaring that the entire amount of the purchase-money for this land at the public sale made by Payne on September 6, 1880, that is to say, the $180.50 with the interest thereon, was a lien on the said tract of land, and when it was paid in full by Titchenell the said tract of land should be conveyed by Feather to him, or if Feather then refused to convey, it should be conveyed to him by a commissioner of the court appointed for the purpose in the decree. Nor was there any error in the decree that, when Titchenell had fully paid off this lien, he should have a writ of possession against Jackson, who had obtained possession of the land, since the deed for it was made to him.

Of course there is much of the evidence in this cause, which according to these views must be regarded as immaterial, and which I have not considered, though much of the argument of counsel was with reference to the facts proven by such evidence, which was contradictory and unsatisfactory. These disputed questions of fact, which I deem irrelevant, are such as these: Did Tichenell pay to Feather the whole or any part of the $52.49 paid to Payne, the commissioner of sale, as the cash payment on the purchase of this land? It was assumed by the decree of the court below, that he did not, and of course the appellants can not complain on this ac-

count. Did Feather promise or agree with Titchenell at any time, that he would extend the time, within which Titchenell should be required to pay any or all of the deferred payments of the land? Did Titchenell offer to pay to Jackson the amount of this purchase-money, and did Jackson refuse to accept it? Was Titchenell utterly insolvent and unable to pay anything? All these and other like controverted questions of fact discussed by counsel would not however settled affect the conclusion I have reached.

It was strongly insisted by the appellant's counsel, that the decree should be reversed, because even if the decree was right in setting aside the sale by Feather to Jackson, still it ought to have provided for a re-sale of the land in order to pay to Jackson, the plaintiff in the former chancery suit, his debt, as it would remain unsatisfied, if this sale to him was set aside; for this debt was satisfied in no other way than by the sale of this land to him. But this decree fails to provide for this protection to Jackson in this or in any other manner; and thus he an innocent party is made to lose his debt, which the court in the former suit had declared to be a lien on this land.

This would be very plausible, if Jackson was an innocent party, and if the result of this decree was necessarially to cause him to lose his debt. But one of these propositions is certainly not true, and the other also is very probably false. Jackson was certainly not an innocent party. The deed to him is set aside, because Feather in violation of his trust conveyed this land to him, and because when he purchased it and directed commissioner Payne to receipt for the purchase-money-notes as paid, he did so with a full knowledge, that Feather was acting in bad faith in selling this land; and he, Jackson was guilty of a fraud, when he purchased from one who, he ought to have known, had no right to sell him the land. More especially was he reprehensible, when he thus wrongfully purchased this land at less than one-half its actual value. If as the result of his improper conduct he loses his original debt, he should regard this loss as the result of an effort on his part to defraud his debtor, Titchenell, of an amount not less than the amount of his debt. But there are strong reasons for believing, that if this original debt has

not already been fully paid to him by Feather, it will be. The full amount of this debt has been or will be paid by Titchenell to Feather, it being a lien on this tract of land; and it is not improbable, that it has already been paid by Feather to Jackson, or if it has not been, that it will be without any controversy or trouble. There is no evidence in this record, it is true, on this subject, and there could be none properly; for it is all foreign to the objects of this suit. Still one can not but suspect this to be the state of the case, because it is obvious, that there is no controversy between these defendants Feather and Jackson, both being represented by the same counsel in this Court. Nor was there any sort of controversy between them in the court below; and as Feather either has or will certainly receive the amount of Jackson's debt against Titchenell, it seems but reasonable to suppose from the relations of the parties, joint appellants in this Court, that Titchenell will, if he has not already done so, pay over to Jackson the full amount of his debt.

But all this is matter foreign to the case before us. To justify the decree of the court below it is only necessary to say, that it had no right in its decree in this cause to have protected Jackson against the supposed or probable fraud of his co-defendant Feather by providing for the payment by Feather to him of this debt, when the purchase-money Feather paid for the land was refunded to him by Titchenell. It is well settled, that a decree between co-defendants can only be based upon the pleadings and proofs between the complainant and defendants. (*Vance* v. *Evans et al.*, 11 W. Va. 342.) Under this rule, it is obvious, the Court could not in this case properly render any decree between the co-defendants Feather and Jackson. There is nothing in the bill or in the answer of Jackson, which rendered it necessary or proper in determining the matters in controversy between the plaintiff and the defendants to enquire into or take any proof whatever relative to any controversy between the co-defendants; and the proof on this subject has been merely casually thrown into the record and is, or might under such circumstances be very vague and unsatisfactory. The whole proof, on which it is claimed that a decree even in favor of

Jackson against his co-defendant, Feather, should be based, is simply the following statement by Payne in his deposition:

"Titchenell never offered to pay any of the purchase-money notes which I held until after the second note became due. Soon after this I learned from Jackson that he had bought the land, and if I am not mistaken he receipted to me for the notes, the debt being due to him."

There is no evidence as to the price Jackson was to pay or did pay Feather for this land or anything beyond this vague statement of Payne to show the character of the dealings between them. There being then in the pleadings between the plaintiffs and defendants nothing whatever to call for any sort of detail as to the dealings between the co-defendants beyond the simple fact, that one of them, Feather, had made a deed to the other, Jackson, for this tract of land, upon the rule and law as laid down in *Vance* v. *Evans et al.*, 11 W. Va. 342, it is obvious, that it would have been improper for the court in this case to render any decree between them. And had such decree been rendered, great risk would have been run of doing one or the other gross injustice. All the facts necessary to render a decree between them justly were not before the court. It was neither necessary nor even proper, that these facts should have been proven in this cause, as they were foreign to the purpose of the suit as shown by the pleadings.

The court therefore did not err in not rendering any decree in this case between these co-defendants or in failing to protect Jackson against the supposed or possible wrongs of his co-defendant Feather. If they have not settled all matters between themselves amicably or can not do so, they must settle them in some other suit, in which the facts actually bearing on the matters between them may be properly put in issue and proven. It is possible, this might be done in the original suit brought by Jackson, if it is still pending; and if it is not, or if it can not be done in this cause, it may be done in a suit brought for the purpose by him against Feather or by Feather against him; but however it may be done, we are safe in saying, it can not be done in this cause, and that therefore there was no error in the court below in

its failure to provide any remedy over against Feather in favor of his co-defendant Jackson, in case Feather has been or shall be paid the purchase-money of the land by Titchenell.

The decree of the circuit court, so far as it set aside and declared null and void the deed of September 13, 1881, executed by Feather to Jackson, is affirmed. But the residue of the decree must be reversed because of the errors principally in the manner in which the court has provided for the carrying out of its views, which views are however substantially correct; and this Court in lieu of these provisions should enter a decree, which will provide for carrying out these views in a proper manner. The errors in the court below in this decree of April 19, 1883, consisted in directing a deed from said Feather to Jackson for this land upon or after the payment of the $208.83, but no proper means was provided for ascertaining whether this $208.83 had been paid, or of ascertaining whether it was to be paid at some future time and when. No such conveyance should have been decreed, till the court had ascertained either by the admission of Feather in open court or by a report of the commissioner, that this $208.83 with interest from April 19, 1883, had been paid, and then it should have ordered this conveyance to be made; and that when made, whether made by Feather or by a commissioner appointed by the court for the purpose, it should contain a covenant of special warranty. And as it appeared that the plaintiff had been turned out of the possession of this land, to which he had an equitable title, by his trustee, the circuit court should have ordered, that the said plaintiff forthwith should have a writ of possession of said land, and should not have postponed his right to sue out such writ, until the plaintiff had satisfied this lien on said land in favor of Feather.

The decree therefore of April 19, 1883, must be affirmed in part and reversed in part as above indicated; and the appellants must pay to the appellees their costs in this Court expended, the appellees being the parties substantially prevailing; and this cause must be remanded to the circuit court of Preston to be proceeded with according to instructions, which should be inserted in the decree entered by

this Court, and further according to the principles governing courts of equity.

AFFIRMED IN PART. REVERSED IN PART.

CHARLESTOWN.

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Z. G. AND A. SOMMERVILLE *v.* J. SOMMERVILLE *et al.*

Submitted September 10, 1885—Decided September 19, 1885.

1. In enforcing a vendor's lien against the estate of a deceased vendee his personal representative is a necessary party to the suit; and the court ought to require the personal estate in the hands of the personal representative to be first ascertained, and how much of it is applicable to the payment of the purchase-money due, and should require it to be applied before decreeing a sale of the land to pay the lien. (p. 482)

2. Under sec. 1 of ch. 132 of the Code a sale can not be set aside merely because the commissioners failed to give bond before making it. (p. 483.)

The opinion of the Court contains a statement of the facts of the case:

R. S. Blair for appellants.

T. E. Davis for appellees.

JOHNSON, PRESIDENT:

The plaintiffs in March, 1880, filed their bill in the circuit court of Ritchie county alleging, that their father John A. Somerville in 1872 purchased a tract of seventy acres of land on Pine creek in said county of John Somerville for $700.00, of which he paid $100.00 in cash agreeing to pay the residue in six annual instalments; that a contract for the sale and purchase of said land was executed by the said John A. and John Somerville; that afterwards their mother, Martha, intermarried with the defendant Clinton Davis, but before said marriage she and said defendant John Somerville agreed, that said contract should be cancelled, and that in considera-

tion of the part of the purchase-money, which had been paid he would execute to said Martha, a deed for six acres of the said seventy acres, which he did; and the contract was destroyed. The plaintiffs charge, that this arrangement was a fraud upon their rights, and that they are entitled to have said contract made with their father specifically enforced, and they ask that the deed made to said Martha be declared null and void and a deed be made to them for the six acres, for the reason that there is a good house upon said six acres, and it would be of more advantage for them to have that unincumbered than the whole tract with the lien thereon; but if that is not possible they pray, that the contract made with their father be specifically enforced, and for general relief. The deed from John Sommerville to their mother is exhibited with the bill.

John Sommerville answered the bill and in his answer says, that he made a deed to John A. Sommerville for the land mentioned in the bill and delivered it to him, about the time he moved on said land, in which he retained a vendor's lein for $600.00; that before his death the said John A. made other payments besides the $100.00 paid down, amounting to $26.00 more; that after the death of said John A. believing it would be the best for the children of said John A. he took up the old deed and for the money paid executed the deed mentioned in the bill to the said Martha for six acres; that he believed it was best for the children he should do this; at the same time he knew it was not according to law; that after the said Martha married the defendant, Davis, respondent "insisted, that they make over the worth of said property to the heirs, and entered into an agreement in writing with them to that effect, providing that the land in question be sold and the proceeds paid to the guardian for the use of said heirs." He further says, that, if the deed to said Martha be set aside as prayed for in the said bill, and respondent be left to enforce his vendor's lien against the land, he believes the land will not bring enough to pay the purchase-money yet due; he says he is willing that it should be set aside, and that he will make the said deed to the heirs, which would be a liberal compensation for the money paid by their father. His prayer is that the answer be treated as a cross-bill, and that

said deed be set aside, and a deed for said six acres be made to the heirs of John A. Sommerville. He also filed an amended answer, in which he says, that since the institution of the suit he has used all the means within his power to have the said Martha Davis and her husband make a deed for said six acres of land to the heirs of John A. Sommerville; that they had repeatedly promised to make said deed but had failed to make the same and thus remove the cause of complaint from the plaintiffs in this cause; that "he is advised, that when he * * made, acknowledged and delivered to the said John A. Sommerville a deed to said seventy-one acres of land, retaining his vendor's lien on the same, in the year 1874 as set out in the respondent's answer and cross-bill, the legal title to the same was vested in and remained in him the said John A. Sommerville until the time of his death, when the title to said land was immediately vested in his heirs subject to the dower interest of the said Martha Sommerville, now Davis, and to your respondent's vendor's lien for the residue of the said purchase-money. He sets up specifically, that he executed said deed for seventy-one acres of land to said John A. Sommerville on December 25, 1874, and charges, that by reason of said lien retained in said deed he is entitled to have said land sold for the payment of said purchase-money due thereon; he prays, that his lien for the purchase-money may be enforced.

Martha Davis answered the bill and claims that $150.00 had been paid on said land. She avers, that she committed no fraud; admits she did what is charged in the bill, but says she did it for the best interest of her children. She says that she is unable to read writing, but supposed the deed was to her for life and then to her children.

On March 5, 1881, the cause was heard, and the deed to Martha Sommerville, now Davis, for the six acres was cancelled, and it was ascertained, that the purchase-money due amounted to $802.28 and was a lien on said land; and the court decreed the "said deed null and void and of no effect whatever, and it further adjudged, ordered and decreed that complainants or some one of them do pay to John Sommerville the residue of the purchase-money, which is now due on the said seventy acres, which amounts to this date to-wit, on March 7, 1881 to $802.28, and which is declared to be a lien by

virtue of the lien retained in deed for said seventy acres of land," and provided, that if not paid within thirty days, commissioners therein appointed should sell the same, and providing that bond should be executed before sale, &c. The commissioners filed their report of sale showing that the land was sold to John Sommerville for $550.00. The court overruled the exceptions of defendant, Martha Davis, and confirmed the sale and provided for making a deed to Sommerville for the said land, and further provided: "And it appearing to the satisfaction of the court that the net proceeds of the sale aforesaid, are not sufficient to satisfy and discharge the amount heretofore decreed to the said John Sommerville and after deducting the net proceeds of this sale there will still remain due and owing to the said John Sommerville the sum of $221.00, leave is given to the said John Sommerville to sue out execution for this amount."

Martha Davis excepted to the sale, on the ground that the land sold for a grossly inadequate price, and in support of the exception filed five affidavits; and she further excepted, on the ground that the commissioner had not given bond, as required by law. As before stated, the exceptions were overruled. A bond purporting to have been filed by the commissioner some days after the sale was made appears to be copied by the clerk, but it is no part of the record.

From the several decrees the plaintiffs appealed.

The first error assigned is, that no decree should have been rendered in the absence of the personal representative of John A. Sommerville. This is true. In enforcing a vendor's lien against the estate of the vendee after his death the court ought to require the personal estate in the hands of the administrator to be first ascertained, and should ascertain how much of it is applicable to the payment of the purchase-money due, and should require the personalty to be so applied, before it decrees a sale of the land to pay the lien. In such case of course the administrator is a necessary party to the suit. (*Bierne* v. *Brown*, 10 W. Va. 748.)

It is insisted, that the court erred in cancelling the deed for the six acres to Martha Sommerville. In this the court did not err, as the legal title to the land was in the heirs of John A. Sommervile.

As the decrees must be reversed, it is unnecessary to consider, whether the land sold for a grossly inadequate price.

It is insisted, that the court erred in setting aside the sale, because the commissioners had sold the land before executing the bond. The Code, sec. 1, ch. 132, provides: "A court in a suit properly therein may make a decree or order for the sale of property in any part of the State, and may direct the sale to be for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner to make such sale. No special commissioner appointed by a court shall receive money under a decree or order, until he give bond before the said court or its clerk." Chap. 142, sec. 1, Acts of 1882, amending this section, provides among other things, that "No sale shall be made by such commissioner until such bond and security has been given and approved by the clerk; and every notice of such sale shall have appended to it the certificate of such clerk, that the bond and security have been given by the commissioner as required by law." The law, it will be seen, is much more stringent now than under the Code. The sale in this case was made under the provision of the Code. We can not say, that the failure to give bond in this case before the sale vitiated it. The provision of the Code does not authorize us to say the sale for this reason was void.

It is a mistake to say, that there was a personal decree against the infants. It does not amount to a personal decree, and no execution could issue thereon. It amounts merely to an ascertainment of the amount due on the land. Of course no personal decree could be rendered against the heirs for the debt of the ancestor. (*Rex* v. *Creel*, 22 W. Va. 373.)

For the reasons aforesaid the decrees appealed from are reversed with costs to the appellants, and the sale is set aside, and the cause remanded with leave to amend the bill as herein indicated.

REVERSED. REMANDED.

CHARLESTOWN.

JOHN SOMMERVILLE *v.* Z. G. SOMMERVILLE *et al.*

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Submitted September 10, 1885.—Decided September 19, 1885.

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1. In a suit to subject lands descended to the heir to the payment of the debts of the ancestor the personal representative of the ancestor is a necessary party. (p. 485.)

2. It is generally erroneous to decree sale of land, in which a widow is entitled to dower, to pay liens or debts against it without first assigning the widow her dower therein. (p. 485.)

The facts of the case are stated in the preceding case.

R. S. Blair for appellants.

T. E. Davis for appellee.

JOHNSON, PRESIDENT:

John Sommerville filed his bill in January, 1884, in the circuit court of Ritchie county, against Zetta G. Sommerville and Allena Sommerville, infants and heirs at law of John A. Sommerville, deceased, and Martha A. Davis and Clinton Davis, her husband, and set up the facts contained in the statement of the foregoing case with regard to the enforcement of his vendor's lien against a tract of seventy-one acres of land by him sold to John A. Sommerville in his lifetime, and claimed that by virtue of a personal decree in said former suit for $221.00 balance of the purchase-money after a sale of the land he had a lien against a certain tract of 62¼ acres of land descended to said infant defendants, heirs at law of said John A. Sommerville, deceased, subject to the dower of defendant, Martha F. Davis, who was the widow of said John A. Sommerville. He alleged, that the estate was indebted to him in that sum with interest, and prayed that said 62¼ acres be sold to satisfy the debt of the ancestor of said infant defendants. The administrator was not made a defendant to the suit. The bill alleged that Sommerville's personal estate was not sufficient to satisfy plaintiff's demand. It was not charged, that he had no personal estate. The bill was demurred to, and the demurrer was overruled. The infant defendants by guardian *ad litem* answered the bill.

On November 4, 1884, the cause was heard, and the court ascertained, that the plaintiff was entitled to receive of the defendants, the infant heirs of John A. Sommerville, deceased, $221.00, with interest from November 18, 1881, the amount ascertained by a decree in the former suit rendered on that day, and that said 62¼ acres of land were liable to be sold to pay the same. The court also decreed, that unless the said sum was paid within thirty days, a commissioner appointed by said decree should sell the said land for the payment of said debt. From this decree the defendants, Zetta and Allena Sommerville, and Martha Davis and Clinton Davis appealed. The bill exhibits the record in the foregoing case and claims, that there was in that cause a personal decree rendered against the heirs for $221.00, balance of debt of their ancestor. There is no such personal decree; the first of the decrees amounts to no more than an ascertainment of the amount of the debt due; no execution could issue thereon. The bill sets up the debt ascertained in the former suit, to which the heirs were parties, and alleges that a certain tract of 62¼ acres of land descended from said debtor to said heirs.

The suit proceeds upon the wrong principle, that the plaintiff had a lien against the land by virtue of a personal decree against the heirs for the debt of the ancestor. There is no doubt, that land descended to the heir is liable for the debts of the ancestor; and the bill in this case must be regarded sufficient, if true, to charge the land descended to the heirs with the ancestor's debt. (*Rex* v. *Creel*, 22 W. Va. 373.) But before the land descended to the heirs can be charged with the debts of the ancestor, the personal property belonging to the estate of the ancestor must first be applied. The administrator was a necessary party to this suit; and for that reason the decree must be reversed. From the bill it is clear, that Martha F. Davis was entitled to dower in the 62¼ acres, and the court clearly erred in decreeing a sale without assigning the same. (*Laidley* v. *Kline's Administrator*, 8 W. Va. 229; *Underwood* v. *Underwood*, 22 W. Va. 228.)

The decree must be reversed and the cause remanded with leave to amend the bill by making the administrator of John A. Sommerville's estate a party-defendant.

REVERSED. REMANDED.

CHARLESTOWN.

26 486
41 69

PARK v. N. Y. & KA. OIL Co. *et al.*

Submitted June 19, 1885.—Decided September 19, 1885.

1. A corporation must defend a suit against it in its corporate name; and the stockholders will not be permitted to defend, unless the corporation refuse to do so. (p. 487.)

2. Where a suit is brought against a corporation, and a purchaser of the stock of the corporation files his answer in defence of the suit without showing that the corporation has refused to defend the suit, it is not error to strike out his answer. (p. 487.)

The facts of the case sufficiently appear in the opinion of the Court.

Leonard & Caldwell for appellant.

W. S. Sands for appellee.

JOHNSON, PRESIDENT:

This was an attachment suit in equity. The bill alleged services performed for the defendant by one Sayre amounting to $670.00, the account for which Sayre assigned to the plaintiff. The bill was filed in June, 1881. An order of publication was issued at the same rules when the bill was filed. At July rules the order was returned executed. The defendant never appeared in the case. In July, 1881, one E. K. Ware filed a petition alleging that he was the owner of the attached property, and asking to be made a defendant in the suit. The answer was filed, which the plaintiff took time to consider. The answer avers that defendant Ware had purchased three fourths of the stock of said defendant company and had a deed therefor; that he had taken possession of the land of the company under said purchase and had kept the property for ten years, and had not been called on to account for any part thereof. He denies the justice of the plaintiff's account, &c. No reason is given in the answer, why the corporation does not answer the bill. Nothing in the record appears to show that the corporation had declined to defend the suit. By a decree entered in the cause on October 27, 1881, on motion of the plaintiff the petition and answer of E. K. Ware were stricken from the record. An

account was taken in the cause, and a decree rendered in favor of the plaintiff for $677.10 and interest, and ordering the attached land to be sold. This decree was rendered on March 30, 1882. The sale was made, and on June 27, 1882, was confirmed. The defendant-corporation and E. K. Ware presented a petition to this Court for an appeal from said final decree. No appeal was granted the defendant-corporation, because it had not appeared in the suit in the court below, and until it had done so, no appeal could be granted to it. An appeal was granted to the defendant E. K. Ware.

The first question presented is: Did the court err in striking out the said Ware's petition and answer? In the case of *Joseph E. Park* v. *The Ulster & Kanawha Petroleum Company*, 25 W. Va. 108, a case in principle precisely like this, the Court held, that a corporation must defend a suit brought against it in its corporate name, and a purchaser of stock of the corporation will not be permitted to defend, unless the corporation has refused to do so. If in such a case the officers or agents of the corporation refuse in its name to defend the suit, the court may in equity allow such defence to be made by the stockholders.

The corporation and not the stockholders is the legal owner of the corporate property. Therefore where the corporation did not defend a suit brought against it, and one who had purchased the stock without showing any reason, why the corporation did not defend the suit, filed his answer denying the liability of the corporation, it was held he was not under these circumstances permitted to defend, and his answer was properly stricken out. This cause in this respect is similar to the former suit against another oil company, where this same defendant attempted to defend in place of the corporation; and we are compelled to hold for the reasons fully stated in that cause, that the court did not err, in striking out his petition and answer; and therefore the decree appealed from in this cause, is affirmed at the costs of said E. K. Ware without prejudice to the right of the defendant-company within the period permitted by law to appear in the court below and have a re-hearing of said cause, and if decided adversely to it, without prejudice to its right of appeal.

AFFIRMED.

26 488
34 368

CHARLESTOWN.

WILLIAMS *et al. v.* COUNTY COURT OF GRANT CO. *et al.*

Submitted September 3, 1885.—Decided September 19, 1885.

1. A bill of injunction in equity will not lie to restrain the collection of a tax laid by a county court for county-purposes, on the sole ground that the assessment of the tax is illegal. There must exist in addition circumstances bringing the case as presented by the bill under some recognized head of equity such as the preventing of a multiplicity of suits. (p. 493.)

2. But if one or more tax-payers of the county on behalf of himself or themselves and all other tax-payers of the county subject to the illegal tax complained of file their bill of injunction to prevent the collection of such tax, it will lie, on the ground that such injunction will avoid a multiplicity of suits. (p. 518.)

3. But there must be an averment in such bill, that it is filed by the plaintiff or plaintiffs on behalf of himself or themselves and of all other tax-payers subject to the illegal tax. Such an averment is absolutely essential to give a court of equity jurisdiction on the ground of avoiding a multiplicity of suits. (p. 524.)

4. If such averment is not made, the bill is fatally defective on demurrer, when the avoiding of a multiplicity of suits is the only ground for equitable interference on the face of the bill; but if such averment is omitted, the court will not dismiss the bill absolutely in every case but will give the plaintiffs leave to amend the bill by the insertion of such averment, provided the so doing does not alter the character and objects of the suit so as to make it essentially a new suit. (p. 528.)

5. In such suit all the plaintiffs and all those, on whose behalf it is brought, must have a common cause of action and represent a single and entire claim or interest. The grievance complained of must be the same as to all, so that there could not be on the facts stated in the bill a decree dismissing the bill as to some and sustaining it as to others, should some of the facts alleged be proven and others not proven. If this common cause is not stated in the bill, it should be dismissed on demurrer. (p. 532.)

6. If a dog-tax be assessed by a county court under the 23d chapter of the Acts of 1881, and a bill be filed by several owners of dogs in a particular district in the county for themselves and all other owners of dogs in that particular district to enjoin the collection of such dog-tax in said district then in the hands of a constable of such district for collection, in which the county court of

the county, the sheriff of the county, to whom under the law the tax is to be paid over, and the constable of the district, whose duty it is to collect the tax, are made defendants, such bill ought to be dismissed on demurrer, even though this act of the legislature was unconstitutional and the tax illegal, because there are neither proper parties to such bill, plaintiffs or defendants, nor is the object of such bill one which ought to be granted; the injury, if this dog-tax be illegal, is common to all the owners of dogs in the county; and if these plaintiffs had filed a bill on behalf of themselves and all other owners of dogs in the county subject to this tax, they might sustain their suit to enjoin the collection of any part of such illegal tax in any part of the county. But the bill as filed was so essentially different from the bill, which should have been filed, that on sustaining a demurrer to such bill the court ought not to allow it to be amended and converted into the bill, which as stated above could be sustained, as this should be regarded as a distinct suit and not as an amendment to the original bill. (p. 530.)

GREEN, JUDGE, furnishes the following statement of the case:

Joseph V. Williams, George F. Cunningham and Edward Williams suing on behalf of themselves and other tax-payers of Grant district in Grant county, filed their bill in the circuit court of Grant county against the county court of said county, A. W. Coler and Morgan T. Smith constables of said district and A. C. Scherr sheriff of said county. In their bill they alleged that they are residents and tax-payers of said Grant district in said county, and that said county court on June 16, 1881, professing to act in pursuance of ch. 23 of the Acts of the Legislature of West Virginia of 1881 levied fifty cents on every male dog and $1.00 on every female dog in said county to be paid by the persons respectively, in whose name the dog shall be listed; and further ordered that after the payment of a reasonable compensation to the assessor and clerk for services rendered under said act, to be paid out of the fund arising from the dog-tax, the residue of said fund should be appropriated to pay for sheep destroyed by dogs, said payments to be made in accordance with and subject to secs. 5 and 6 of said chapter and the residue of the money arising from said dog-tax, after the payment of said claims should be appropriated to the general fund of said county, all of which appeared from a copy of said order filed with the bill as an exhibit; that the assessor of said county then

proceeded to list all dogs in Grant district and returned two copies of said list to the clerk of said county court, and said clerk entered on said list taxes against the owners of said dogs in said list named at the rate of fifty cents for each male dog and $1.00 for each female dog, and then delivered a copy to the defendant A. W. Coler, who is a constable for said Grant district, to collect the taxes thereon. A copy of said list so delivered is filed as an exhibit with the bill.

The bill further alleges, that on said list the plaintiff, George Cunningham, is charged with $3.00 of taxes, the plaintiff, James V. Williams, with $2.00 and the plaintiff, Edward Williams, with $2.00. And said constable, A. W. Coler, is proceeding to collect these illegal taxes from the residents and tax-payers of Grant district and has declared his purpose to levy on the property of those, who do not pay, and sell the same. The plaintiffs further allege, that a part of said list of illegal taxes on dogs was then in the hands of Morgan T. Smith, who was also a constable of said district; and that he had levied on a buggy the property of the plaintiff, Joseph V. Williams, and has given public notice, that persons, who do not pay this dog-tax by January 10, 1882, will incur costs. A copy of this notice is filed with the bill. The plaintiffs allege further, that said Smith had no pretence of authority to collect this dog-tax, as the list had been delivered by the clerk not to him but to Coler, yet he had advertised said buggy for sale. A copy of the advertisement is filed with the bill which concludes thus:

"And plaintiffs say that they are advised that the action of said defendant, the county court of Grant county, in levying the said taxes on dogs was illegal and void, and that neither the plaintiffs nor any of the tax payers named in said list can be compelled to pay said taxes. First, because the said taxes are not laid equally and uniformly throughout the State.

"Second. Because the property upon which said taxes is assessed is not taxed in proportion to its value, ascertained as directed by law, as required by the constitution of this State.

"Third. Because the said county court of Grant county has no power to levy and collect a license-tax for county-purposes, if this is properly called a license-tax.

"Fourth. Because it is the design and purpose of the said defendants under the pretence of levying a tax for public purposes to take the private property of the plaintiffs and the other tax-payers of said county and district, who are assessed with said dog-tax, against their consent and pay it over to other private citizens of said county "to pay for sheep destroyed by dogs," losses, for which plaintiffs are in no way responsible, and to which they have not in any way contributed.

"And plaintiffs say, that if they and the other tax-payers aforesaid are obliged and compelled to pay said tax, the money derived therefrom will be paid over by the constable, who collects the same, into the hands of the said defendant, Arnold C. Scherr, the sheriff of Grant county, and will be paid out by him to other private citizens of said county, as ordered by the said county court in the order entered by it on June 16, 1881, hereinbefore mentioned.

"The plaintiffs therefore pray that the said 'the county court of Grant county,' A. W. Coler, constable of said county, Morgan T. Smith, constable of said county, and Arnold C. Scherr, sheriff of said county, may be made defendants to this bill, and may be required to answer the same, and that a writ of injunction may be awarded the plaintiffs, restraining the said constables A. W. Coler and Morgan T. Smith, or either of them, from levying upon and selling the property of the plaintiffs, or any of them, for the enforcement of said tax on dogs; and also restraining the said constables, or either of them, from collecting in any manner the said tax on dogs assessed against the plaintiffs and other tax-payers of said Grant district of Grant county and also restraining the said county court of Grant county from appropriating any money which has been or may be collected from said tax on dogs or from any other source to the payment of losses to private individuals from the destruction of sheep by dogs, and also restraining the said Arnold C. Scherr, the sheriff of said Grant county, from paying out any funds or money that may come into his hands from said tax on dogs to private persons or individuals for losses or on claims for losses occasioned by the destruction of sheep by dogs. And that the plaintiffs may have such other and further re-

lief as the nature of their case may require or the court may see fit to grant."

On January 26, 1882, an injunction was awarded as prayed for, to take effect on the plaintiffs or some one of them giving bond before the clerk with security to be approved by him in the penalty of $500.00, and with conditions to pay all costs, that might be awarded against them and all damages, which might be incurred by the granting of said injunction, if it should be dissolved. The injunction-bond required was given, and the following final decree was entered April 3, 1883:

"This day came the defendants, by their attorneys, and demurred to the complainant's bill on the ground of want of proper parties, and because said bill is not filed on behalf of all the tax-payers of Grant county similarly situated to complainants, and because all the constables of Grant county are not made defendants to the bill, which being argued by counsel is overruled by the court, and this cause coming on April 3, 1883, upon the motion of the defendants to dissolve the injunction heretofore awarded against the defendants, upon consideration whereof, the court being of opinion that said injunction was properly awarded, doth adjudge, order and decree that the said injunction be and the same is hereby perpetuated, and that the defendants and each of them be perpetually enjoined and restrained from collecting the dog-tax mentioned in the bill from the complainants or any other person within the district for which the defendants Coler and Smith are constables."

On the petition of the county court of Grant an appeal was granted to this decree.

F. M. Reynolds for appellant.

George E. Price for appellee.

GREEN, JUDGE:

This was an injunction to stop the collection of what is known as the dog-tax levied by the county court of Grant county under ch. 23 of the Acts of 1881, and to restrain the county court of Grant from appropriating any money arising from this dog-tax or from any other source to the payment

of losses to private individuals by the destruction of sheep by dogs, and to restrain the sheriff of said county from paying out for said purpose any funds that might come into his hands from this dog-tax. This act by its tenth section (see p. 270 of Acts of 1881,) provided, that it should not take effect in any of twenty-eight counties, therein named, until the same was adopted by a vote of the people of such county in the manner provided in the eleventh section of this act. But Grant was not one of these twenty-eight counties, so that this act was in operation in Grant county from its passage, March 11, 1881, provided such act is not null and void because unconstitutional. The county court of Grant, as shown by the bill, levied this dog-tax on June 16, 1881.

The principle question intended to be raised by the bill in this cause is: Was this act of March 11, 1881, (ch. 23 of Acts of 1881) constitutional? Before considering this question we must first consider, whether it is properly raised in a suit of this character, and if so, whether there are the necessary and proper parties to this cause to justify this Court in deciding in this cause whether said act is or is not constitutional.

I shall therefore first consider, whether a court of equity will enjoin the collection of a county-tax, which has been illegally and unconstitutionally assessed, or will leave each tax-payer severally to his legal remedies, after the tax has been wrongfully enforced against him. It may be regarded as well settled, that the mere illegality of the tax complained of or its injustice or irregularity of itself gives no right to an injunction in a court of equity. To entitle a party to such relief, he must bring his case under some acknowledged head of equity-jurisdiction. (*Dow* v. *Chicago*, 11 Wall. 108; *Hannerwinkle* v. *Georgetown*, 15 Wall. 548; *Brewer* v. *Springfield*, 97 Mass. 152; *Durant* v. *Easton*, 98 Mass. 469; *Lovel* v. *Charlestown*, 99 Mass. 208; *Whiting* v. *Boston*, 106 Mass. 89; *Hannersville* v. *Charlestown*, 106 Mass. 350; *Rockingham Savings Bank* v. *Portsmouth*, 52 N. H. 17; *Deane* v. *Todd*, 22 Mo. 90; *Sayre* v. *Tompkins*, 73 Mo. 423; *Barrow* v. *Davis* 46 Mo. 394; *McPike* v. *Pew*, 48 Mo. 525; *Baltimore* v. *Baltimore & Ohio R. R. Co.*, 21 Md. 50.) But there is a large number of decisions by courts of the greatest respectabilty to the effect, that if a party or parties bring such a suit properly,

they place themselves and their cause under an acknowledged head of equity-jurisdiction, the avoiding of a multiplicity of suits, and are therefore entitled to an injunction to stay the collection of such illegal and unconstitutional tax. On the other hand there are many equally respectable courts who refuse to grant an injunction or entertain jurisdiction in such case, holding this is not the multiplicity of suits to be avoided which confers equity-jurisdiction. These cases decide, that a court of equity will not exercise jurisdiction or grant relief upon the doctrine of preventing a multiplicity of suits, whether the suit be brought by a single tax-payer and property-owner or by one or more suing on behalf of himself and others or by many individuals united as co-plaintiffs to restrain the enforcement of, or to set aside and annul, or to be otherwise relieved from any local municipal assessment or any tax purely personal and not made a lien upon real property laid by a county, town, city or district, whereby a public indebtedness is or would be enhanced, upon the ground that such assessment, tax, official proceeding or public debt was illegal and either voidable or void. (*Dodd* v. *Hartford*, 25 Conn. 232, 234; *Sheldon* v. *School District*, 25 Conn. 224, 228; *Youngblood* v. *School District*, 32 Mich. 406; *Howell* v. *City of Buffalo*, 2 Abb. App. Dec. 412, 416; *Bouton* v. *Brooklyn*, 15 Barb. 375, 387, 392, 394; *Harkness* v. *Board of Public Works*, 1 McArthur 121, 127, 133; *Kilbourne* v. *St. John*, 51 N. Y. 21, 27; *Ayres* v. *Lawrence*, 63 Barb. 454; *Tift* v. *Buffalo*, 1 T. & C. 150; *Combs* v. *Supervisors*, *Id.* 296; *Barnes* v. *Beloit*, 13 Wis. 93; *Newcomb* v. *Horton*, 18 Wis. 566, 568, 569; *Cutting* v. *Gilbert*, 5 Blatch. 259, 261, 263; *Phelps* v. *Watertown*, 61 Barb. 121, 123.)

Some of these decisions are based on the ground that is contrary to public policy and governmental expediency to permit the awarding of such injunction. These cases were much controlled and influenced by the cases of *Doolittle* v. *Supervisors*, 18 N. Y. 155, and *Roosevelt* v. *Draper*, 23 N. Y. 318, which were based on the position, that when local officers, as of a county or city, having *quasi* legislative and administrative functions do some official act, which is illegal or in excess of their powers, an individual citizen, who

suffers thereby only the injuries, which are sustained in common by all other members of the community—that is, suffers no special injury, has no cause of action whatever. His only redress in such case is an appeal to the legislature or to the voters to elect officers, who will repeal or nullify the illegal and oppressive acts complained of. But as these grounds are not taken in many of the cases cited, it is to be presumed, that they were regarded as untenable or at least questionable. The ground, on which these other cases are based, is that the plaintiffs in such a suit, though it be brought on behalf of themselves and of all others, do not show a case for the application of the rule for the prevention of a multiplicity of suits, as no one of the plaintiffs is threatened with many suits or much litigation. As this is the much more plausible reason, on which to base decisions of this character, I will set out their reasoning in the language of two of the ablest of the judges, who have entertained these views in order that their full force and weight may be distinctly seen and appreciated.

In Dodd et. al. v. *City of Hartford*, 25 Conn. 232, Dodd and thirty-two others filed a bill in behalf of themselves and others against the authorities of Hartford praying an injunction restraining the defendants from enforcing the collection of certain assessments for the expenses of constructing a sewer in said city, for the enforcement of which a warrant of distress had been issued and levied on the goods of Dodd, and like steps were threatened to be taken to enforce the tax against the others. The bill stated these facts, and for reasons stated the assessment of this tax was claimed to be illegal and void. The bill further stated, that Dodd had commenced against these authorities of Hartford City an action of trespass, and that unless they were enjoined from collecting this illegal tax, some 300 separate actions of like character would have to be instituted, causing great expense and vexation; and the bill prayed, that in order to prevent a multiplicity of suits and to determine the rights of the parties, the defendants might be enjoined from collecting this tax or assessment. The bill was demurred to, and the demurrer was sustained. In pronouncing the opinion of the supreme court of errors Seymour, Judge, says on pages 237 and 238:

"We are of opinion that the court has no jurisdiction to interpose by way of injunction as prayed for. No property, right or franchise held by the piaintiffs in common is claimed to be affected by the proceedings of the city. The assessments are against the plaintiffs severally, not against them jointly. If the warrants are collected and any of these parties have occasion to bring suits at law, their suits must be several and separate; they certainly can not join in an action at law against the city or against the collector. In respect to each of these plaintiffs, taking his case separately, it is difficult to see why he has not adequate remedy at law. There is no averment that the real estate of any of the parties has been or can be levied upon. The warrant authorized the taking of personal estate only. No irreparable injury can arise from the levy. If the proceedings of the common council are irregular and void, as the plaintiffs claim they are, an action at law will lie to recover all the damages which shall be sustained by the levy, and the question of the legality of the assessment will then be tried, in its appropriate forum, a court of law. The claim most pressed by the plaintiffs, is that the court ought to entertain jurisdiction in order to prevent the multiplicity of suits. But no one of these petitioners has any interest in the suit which another of them may be called upon to institute. They can not individually complain that others are compelled to sue, for they have no share in the expenses or vexation of each others suits. The multiplicity of suits which the bill seeks to avoid does not effect injuriously any one of the plaintiffs. No one of them has any occasion to expect any such multiplicity affecting himself. One suit is all that any one of them has to fear and the object of this bill would seem to be, to relieve these parties severally from their one suit, and to consolidate the apprehended litigation. In other words to enforce a consolidation rule, by means of the extraordinary power of a court of chancery. If the assessment were against one person only, it is not claimed that he could transfer from a court of law to a court of equity, the question of his liability. But how is the condition of any one of these petitioners the worse, because others are assessed for the same improvement. It would undoubtedly be convenient to try the questions rela-

ting to these warrants in one comprehensive law suit. But it does not seem to the court that the case presented by the bill is one of such irreparable injury, or of inadequate relief at law, as to warrant as in taking it away from the legal tribunals. There are also reasons of policy, founded on the necessity of speedy collection of taxes, which ought to prevent a court of chancery from suspending these proceedings, except upon the clearest grounds."

Though no authorities are cited to support these views, yet I have thought it proper to quote this opinion at length, because it presents in the strongest manner the reasons, why an injunction should not be awarded in a case similar to the one presented by the bill in the cause before us. We will presently see however, that the convenience of trying the questions, which arise in such cases, in one comprehensive suit are so great, that as they can not be tried in one suit at law, a court of equity according to the decided weight of authority now will interpose to avoid this great multiplicity of suits and that too despite the necessity of the speedy collection of taxes. The above case was decided in 1856. But it must be admitted, that there are a number of courts of the highest respectability, who still entertain views very like to those expressed in this opinion. Thus in *Younyblood et al* v. *Sexton*, 32 Mich. 400, decided in 1875 it was held, that the tax imposed by the liquor-tax-law of Michigan passed in 1875 being a personal tax merely, its collection could not be enjoined, even though it was illegal, the ordinary legal remedies being sufficient for such cases. Cooley, judge, in pronouncing the opinion of the court, says:

"The bill in this case was filed to restrain the collection from the several complainants of a tax assessed against them separately in respect to the business in which each is engaged. It is a personal tax purely. It was decided at an early day in this State that equity has no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal; the ordinary legal remedies being ample for the parties' protection. *Williams* v. *Detroit*, 2 Mich. 560. The principle has ever since been regarded as not open to controversy in this State, and it was applied without its soundness being contested in *Henry* v. *Gregory*, 29 Mich. 68, decided last year.

In other States it is supported by a strong preponderance of authority. *Brewer* v. *Springfield*, 97 Mass. 152; *Durant* v. *Eaton*, 98 Mass. 469; *Lovel* v. *Charlestown*, 99 Mass. 208; *Whiting* v. *Boston*, 106 Mass. 89; *Hannerville* v. *Charlestown*, 106 Mass. 350; *Rockingham Savings Bank* v. *Portsmouth*, 52 N. H. 17; *Dodd* v. *Hartford*, 25 Conn. 232; *Riter* v. *Patch*, 12 Cal. 298; *Beni* v. *Patch*, 12 Cal. 299; *Worth* v. *Board &c.*, Winst. Eq. (N. C.) 70; *Van Cott* v. *Supervisors*, 18 Wis. 247; *Greene* v. *Munford*, 5 R. I. 472; *McCoy* v. *Chillicothe*, 3 Ohio 370; *Connolly* v. *Chedie*, 6 Nev. 322; *Deane* v. *Todd*, 22 Mo. 90; *Sayre* v. *Tompkins*, 23 Mo. 443; *Barrow* v. *Davis*, 46 Mo. 394; *McPike* v. *Pew*, 48 Mo. 525; *Brooklyn* v. *Meserole*, 26 Wend. 132; *Intendant* v. *Pippin*, 31 Ala. 542; *Baltimore* v. *Baltimore & Ohio R. R. Co.*, 21 Md. 50; *Dow* v. *Chicago*, 17 Wall. 109; *Hannewinkle* v. *Georgetown*, 15 Wall. 545.

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"The grounds suggested, but not argued, as giving equitable jurisdiction in this case are, first, that thereby a multiplicity of suits may be avoided. * * * If complainants rely upon the jurisdiction of equity to take cognizance of a controversy when thereby a multiplicity of suits may be prevented, the reliance fails, because the principles which govern that jurisdiction have no application in this case. It is sometimes admissable when many parties are alike affected or threatened by one illegal act, that they shall unite to restrain it; and this has been done in this State in the case of an illegal assessment on lands. *Scofield* v. *Lansing*, 17 Mich. 437. But the cases are very few and peculiar when this can be permitted, unless each of the complainants have an equitable action on his own behalf. Now the nature of this case is such that each of these complainants, if the tax is invalid, has a remedy at law which is as complete and ample as the law gives in other cases. He may resist the process as he might any other trespass, or he may pay the money under protest, and at once sue and recover it back. But no other complainant has any joint interest with him in resisting this tax. The sum demanded of each is distinct and separate and it does not concern one of the complainants whether another pays or not. All the joint interest the parties have is a joint interest in a question of law; just such an interest as

might exist in any case where separate demands are made of several persons. Such a common interest there might be if several persons should give several promissory notes on distinct purchases of a worthless article; and such then might have been under the former prohibition law had demands been made against several persons for liquors illegally sold to them. We venture to say that it would not be seriously suggested that a common interest in any such question of law, where the legal interest of the parties were wholly distinct, could constitute any ground of equitable jurisdiction, when the several controversies affected by the question were purely legal controversies. Suits do not become of equitable cognizance because of their number merely. This was affirmed in *Lapeer County* v. *Bart*, Har. Ch'y 157, and in the two cases of *Sheldon* v. *School District*, 25 Conn. 224, and *Dodd* v. *Hartford*, *Ib.* 232, which in their facts, so far as this question is concerned, were like the present case, with a single exception which is not to the advantage of these complainants. In those cases the single assessment of a school-tax was involved, and the parties concerned if permitted to unite might have had the whole controversy determined in one suit.

"In this case the controversy is either separate, as the tax is several against each individual, or it is general, as it affects all the persons taxed under the law. Considered as a controversy which affects all the persons taxed, this suit would wholly fail in the purpose of preventing a multiplicity of suits, because the court in which it was brought has only a local and limited jurisdiction. Other suits might be brought outside of Detroit, and in every county of the State; and at best this suit would only reduce the number of suits while it could not prevent a multiplicity of them. On this general subject we content ourselves with referring further to *Jones* v. *Garcia*, 1 Turn. & Russ. 297; *Yeaton* v. *Lennox*, 8 Pet. 123; Adams Eq. 198, 202."

The grounds for refusing an injunction in a cause like the one before us are in this opinion of Judge Cooley presented in their full force. But very few of the cases cited by Judge Cooley give really any support to the views expressed by him. Nearly all of them simply decide, what must be regarded as well settled, that the mere illegality of a tax

complained of or its injustice or irregularity gives no right to an injunction in a court of equity, there being no grounds alleged in the bills in nearly all these cases, why a court of equity should assume jurisdiction under the head of avoiding a multiplicity of suits or under any other acknowledged head of equity-jurisdiction.

These views of Judge Cooley, though supported by many authorities of great weight other than those cited by him, are, repudiated by the decided weight of authority. Pomeroy in his Equity Jurisprudence (see note to § 260, vol. 1, p. 278) arranges the cases when courts of equity have entertained jurisdiction and when necessary have awarded injunctions to stay the collection of illegal taxes levied by counties, cities and districts and even states, or have entertained suits and interposed to annul proceedings, which would necessarily result in a public debt, when such proceedings by public authorities were illegal, the ground of such interposition being the avoiding of a multiplicity of suits. In some of these cases the suit was brought by a number of tax-payers or by one suing on behalf of himself and all others. The following is his list of cases of this character: *Attorney-General* v. *Peelis*, 2 S. & S. 67, 76; *Newmeyer* v. *Mo. & Miss. R. R.*, 52 Mo. 81, 84–89; *Rice* v. *Smith*, 9 Ia. 570, 576; *Stokes* v. *Salt Co.* 10 Ia. 166; *McMillan* v. *Boyles*, 14 Ia. 107; *Roch* v. *Wallace*, 14 Ia. 593; *Ten Eyck* v. *Keokuck*, 15 Ia. 486; *Chamberlain* v. *Burlington*, 19 Ia. 395; *Williams* v. *Penny*, 25 Ia. 436; *Hanson* v. *Vernon*, 27 Ia. 28; *Zorger* v. *Township of Rapids*, 36 Ia. 175; *Board of Commissioners* v. *Brown*, 23 Ind. 161; *Lafayette* v. *Fowler*, 24 Ind. 140; *Noble* v. *Vincennes*, 42 *Id.* 125; *Board of Commissioners* v. *Markle*, 46 *Id.* 96, 103–105; *Galloway* v. *Chatham R. R.*, 63 N. C. 147, 149, 150; *Brodnax* v. *Groom*, 64 *Id.* 244, 246, 247; *Worth* v. *Board of Commissioners*, 1 Winst. Eq. (60 N. C. 617); *Vanover* v. *Davis*, 27 Ga. 354, 358; *Mott* v. *Penn. R. R.*, 30 Penn. St. 9; *Sharpless* v. *Philadelphia*, 21 *Id.* 148; *Moers* v. *Redding*, 21 *Id.* 188; *Ball* v. *Read*, 13 Grat 78, 86, 87; *Mayor of Baltimore* v. *Gill*, 31 Md. 375, 392, 395; *Barr* v. *Denniston*, 19 N. H. 170–180; *Merrill* v. *Plainfield*, 45 *Id.* 126, 134; *New London* v. *Brainard*, 22 Conn. 552, 556, 557; *Webster* v. *Town of Harrington*, 32 *Id.* 131, 140; *Terrett* v. *Town*

of Sharon, 34 *Id.* 105; *Scofield* v. *Eighth School District*, 27 *Id.* 499, 504; *Colton* v. *Hanchett*, Ill. 615, 618; *Robertson* v. *City of Rockford*, 21 *Id.* 208; *Butler* v. *Dunham*, 27 *Id.* 474; *Drake* v. *Philips*, 40 *Id.* 388, 393; *Vielley* v. *Thompson*, 44 *Id.* 9–13; *Allison* v. *Louisville, &c. R. R.*, 9 Bush 247, 252; *Lane* v. *Schomp*, 5 C. E. Green, (20 N. J. Eq.) 82, 89; *Mesen* v. *Port Washington*, 37 Wis. 168.

The following are the cases given by Mr. Pomeroy, in which the suit was brought by only one tax-payer, who on the face of the bill purported to sue for himself alone: *Board of Commissioners* v. *Templeton*, 51 Ind. 266; *Board of Commissioners* v. *McClintock*, 51 *Id.* 425; *Board of Commissioners* v. *Markle*, 46 *Id.* 96, 103–105; *Lafayette* v. *Cox*, 5 *Id.* 38; *Mill* v. *Jenkinson*, 15 *Id.* 425; *Coffman* v. *Keightley*, 24 *Id.* 509; *Oliver* v. *Keightley*, 24 *Id.* 514; *Nave* v. *King*, 27 *Id.* 356; *Board of Commissioners* v. *McCarty*, 27 *Id.* 475; *Harney* v. *Indianapolis Railroad*, 32 *Id.* 244, 247, 248; *English* v. *Smook*, 34 *Id.* 115; *Williams* v. *Penney*, 25 *Ia.* 436; *Hanson* v. *Vernon*, 27 *Id.* 28; *Zorger* v. *Township of Rapids*, 36 *Id.* 175, 180; *Merrell* v. *Plainfield*, 45 N. H. 126, 134; *Webster* v. *Town of Harwinton*, 32 Conn. 131, 140; *Terrett* v. *Town of Sharon*, 34 *Id.* 105; *Prettyman* v. *Supervisors*, 19 *Ill.* 305, 311; *Taylor* v. *Thompson*, 42 *Id.* 9; *Cleghorn* v. *Postlewaite*, 43 *Id.* 428, 431; *Veiley* v. *Thompson*, 44 *Id.* 9, 13; *Clarke* v. *Supervisors*, 27 *Id.* 305, 311; *Allison* v. *Louisville, &c. Railroad*, 9 Bush 247, 252. In reference to these cases Pomeroy says: "It should be observed that all of this latter group of cases arose in States, where the courts had already decided that a tax-suit by many tax-payers joined as plaintiffs or by one suing on behalf of the others would be sustained on the ground of preventing a multiplicity of suits, and they regard a suit by one tax-payer alone as substantially the same in its effects, and treated it in the same manner, citing the same precedents indiscriminately in support of the one or the other form. Indeed, in many of these latter cases, the court expressly said that the suit might be brought in either form, by many tax-payers joining as plaintiffs, by one suing on behalf of the others, or by one suing alone. No distinction in principle was made between the three."

Upon the authority of these cases Pomeroy in his text

says: "In a large number of the States the rule has been settled in well considered and often repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by a number of tax-payers joined as co-plaintiffs, or by one tax-payer suing on behalf of himself and others similarly situated, or sometimes by a single tax-payer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul any and every kind of tax or assessment laid by a county, town or city authorities, either for general or special purposes, whether it be entirely personal in its nature and liability, or whether it be made a lien on the property of each tax-payer, whenever such tax is illegal; and in like manner to set aside and annul every illegal public official action or proceeding of county, town or city authorities whereby a debt against said county, town or city would be unlawfully created, the public burdens upon the community would be unlawfully enhanced, and the amount of future taxation would be unlawfully increased, as for example, unlawful proceedings of municipal authorities to advance money, or to loan the public credit to a railroad, or to bind the municipality in aid of a railroad, or to offer and pay bounties to soldiers, or to erect public buildings, and numerous other analagous proceedings which would necessarily result in a public debt and in taxation for its payment.

"In the face of every sort of objection urged against a judicial interference with the governmental and executive functions of taxation, these courts have uniformly held that the legal remedy of the individual tax-payer either by action for damages, or perhaps by *certiorari* was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances, be a substantial denial of justice which conclusion is in my opinion unquestionably true. The courts have therefore sustained these equitable suits, and have granted the relief, and have uniformly placed their decisions upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits." And he adds: "the result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree which would otherwise require an indefinite

amount of separate litigation by individuals, even if it were attainable by any means. In several of the States there is a long series of these cases extending through a considerable period of time, and it may happen that in the earlier decisions of such a series the court has stated the reasons for its judgment at large and has expressly announced the principle of preventing a multiplicity of suits as the ground of its jurisdiction while in succeeding ones the judges have not thought it necessary to repeat the reasons and grounds which had already been fully explained."

I fully concur with Pomeroy, that these cases do clearly establish the principle, he has deduced from them. I also concur with him, that these principles settled by these decisions are sound; and that the principles laid down by Judge Cooley in the opinion, which I have quoted hereinbefore, are not only unsound but are opposed to the decided weight of authority. In fact Judge Cooley in his work on taxation in the edition of 1879 in effect admits, that his views as above expressed are opposed to the decided weight of authority. He there says: "When the illegality extends to the whole assessment, or when it affects in the same manner a number of persons, so that the question involved can be presented without confusion by one bill filed by all or any number of those affected, there seems to be no sufficient reason why a joint bill should not be permitted. The reasons favoring it are, that it avoids the necessity of a multiplicity of suits and the attendant trouble and expenses; and the objection that the interest of the complainants are several is sufficiently met by the fact that complete justice may be done to all in one suit on the single issue; whereas if the parties did not join, the same issue must be passed upon in separate suits brought by the several complainants. Although there has been some hesitation the weight of authority is decidedly in favor of supporting them and this mode of redress is now commonly resorted to when the case is appropriate to it." Cooley on Taxation, pp. 543, 544.

I have said I concur in the conclusion reached by Pomeroy in his Equity Jurisprudence, and that it is sustained by the numerous cases cited in the note. But an examination of these cases will show, that some of them bear but slightly on

the subject; that others are improperly classified; that in many of them, while a court of equity exercised jurisdiction, it was done apparently without objection, and no reason is assigned for the exercise of the jurisdiction; that in many of them the court exercised jurisdiction without regard to the form, in which the suits were instituted, some of them being instituted by a single tax-payer complainant, others by several tax-payers, and others by one or more tax-payers for himself or themselves and all other tax-payers having like interests; and that in most of the cases the courts paid no attention to whether the suit was brought in one form or in the other. In some of the cases however the question was raised as to the jurisdiction of a court of equity; and the jurisdiction was decided to exist, and then reasons were given for assuming it. Thus in the case cited as *The Attorney-General* v. *Peelis*, 2 S. & S. 67–76, reported in the second volume of Simmon & Stuart found in the latter part of 1 Eng. Chy. Reports, p. 67, this question of the jurisdiction of a court of equity in such a case was considered. It was a bill, in which there were ten plaintiffs, who sued on behalf of themselves and all other tenants and occupiers of houses situated in Great Bolton in Lancaster county subject to the assessment complained of, and the suit was brought against certain commissioners to lay out and establish the town of Great Bolton under an act of parliament conferring certain powers on them, under which they levied a tax or rate on the inhabitants of the town illegally, as the bill claims; and it asked that they be enjoined from enforcing this tax. This bill was demurred to, and the demurrer was overruled. The vice chancellor says:

"To this bill the defendants have put in a general demurrer, and the first point made by them is, that the plaintiffs to the bill have no right to sue on behalf of all other persons on whom the rate in question is assessed; and a late case of *Jones* v. *Del Rio*, before the Lord Chancellor, is cited as authority for that proposition. Then the plaintiff being one of the subscribers to the Perrivian loan, filed a bill on behalf of himself and all other subscribers to that loan, to rescind the contracts of subscription, and to have the money returned. The Lord Chancellor held the plaintiff was not entitled in that case to represent all others of the subscribers, for it did

not necessarily follow that every subscriber should, like the plaintiff, wish to retire from the speculation, and that every individual must judge for himself in that respect. The principle in that case has no application here. The object of the bill is to avoid payment of the assessment in question, and every individual assessment has in that respect one common interest."

It will be observed, that though the attorney-general was made a party plaintiff in this suit, yet the court does not base its decision on the ground that he representing the general public had a right to institute the suit, a position which would seem to be law in New York and perhaps in some other States; but the reasons for sustaining the jurisdiction of a court of equity assigned by the English court necessarily leads to the conclusion, that, if it had been instituted by the tax-payers without joining the attorney-general with them, the court would have still entertained the suit. In truth it would seem from the reasoning of the Vice Chancellor, that he ought not to have been a party, though he says nothing whatever about it.

In the case of the *Board of Commissioners of Clay county et al* v. *Markle et al*, 46 Ind. 96, the object of the bill was to prevent the re-location of Clay county and to enjoin the Board of Commissioners from letting a contract for the erection of a court-house and jail at the proposed county-seat. The plaintiffs in the bill were nine tax-payers, the defendants the Board of Commissioners of Clay county and the persons composing the Board of Commissioners, and the bill claims that the removal of the court-house under the proceedings before these commissioners would be illegal, but that they will make the removal nevertheless, and prays that they be enjoined from so doing. The bill was demurred to, and the court say p. 103:

"The appellants say the demurrer ought to have been sustained, because the contemplated injury would be to the plaintiffs below in common with other tax-payers, citizens and voters of the county, and that courts of equity will not enjoin the commission of an injury at the suit of one of the parties, under such circumstances, and only when the threatened injury will be special to the party asking the injunction. *Doo-*

little v. *Supervisors, &c.*, 18 N. Y. 155, sustaining this position. Other authorities hold the same doctrine. The rulings on the question are not uniform. In some of the States, injunctions are granted in actions by an individual to restrain municipal officers from doing illegal acts, and transcending their lawful powers, when the effect would be to impose upon him an unlawful tax or increase his burden of taxation."

Judge Dillon in his work on Municipal Corporations, considers the question quite fully, and says if the ordinary principle, which obtains as to public nuisances, is applied, it must be admitted, when the duty about to be violated by the corporation or its officers is public in its nature, and affects all inhabitants alike, that one not suffering any special injury can not in his own name, or by uniting with others, maintain a bill to enjoin. The reason urged against it is, that if one can maintain such an action, an indefinite number can do the same. He says: "To allow the taxable inhabitant to maintain a bill for an injunction to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and notwithstanding its departure from apparent principles, has had the quite general, but not uniform approval of the courts in this country; and practically, this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit which, when, judicially settled, in effect settles the question in controversy." See section 736. And again he says: "Much more clearly can this be done when the right of the public officer of the State to sue is not admitted or does not exist." Section 736*a*. The action is regarded in the nature of public proceeding to test the validity of the acts sought to be impeached. In New York, and, perhaps, other States, the attorney-general is authorized to institute and carry on actions for such purposes.

In the *Board &c.* v. *Markle*, 46 Ind. 104 the court say: "It has been settled in this State that the remedy may be had by any tax-payer in his own name. *The City of Lafayette* v. *Cox*, 5 Ind. 38; *Oliver* v. *Knightley*, 24 Ind. 514. In *Harney* v. *The Indianapolis, &c. R. R. Co.*, 32 Ind. 244, the question was made that the plaintiff as a tax-payer had no such interest in the funds of the county as would enable him to maintain

a suit to prevent an unlawful appropriation thereof. This court held the action could be maintained, and said that it was a common remedy in this State and had been sanctioned elsewhere. That was an action to restrain the county from making an unlawful subscription and donation to a railroad company. In *English* v. *Smock*, 34 Ind. 115, the court held that the injunction ought to have been granted, restraining the board of county commissioners from negotiating the county bonds, at the suit of a part of the tax-payers. In *Noble* v. *The City of Vincennes*, 42 Ind. 125, it was held that the city council might be restrained, under certain circumstances, from passing an ordinance to aid in the construction of a railroad. In this, like all the other cases, the action was instituted, and the extraordinary remedy sought, by one or more tax-payers in his or their own names. In some of them the doctrine now contended for was not mentioned. See *The City of New London* v. *Brainard*, 22 Conn. 552; *Scofield* v. *Eighth School District*, 27 Conn. 499. The same has been held in Iowa; *Rice* v. *Smith*, 9 Ia. 570, which was to enjoin the erection of a court-house at a place, which was not the county seat of the county. In Illinois, *Colton* v. *Hanchett*, 13 Ill. 615. In Maryland, *The Mayor of Baltimore* v. *Gill*, 31 Md. 375. In New Hampshire, *Merrell* v. *Plainfield*, 45 N. H. 126. In many of the cases which we have exmained, the question was made and passed upon, and in others the right to maintain the action by an individual was recognized without any question. In *The Mayor, &c. of Baltimore* v. *Gill*, 31 Md. 375, the point was made, and the right maintained by the court and many authorities reviewed and criticised. The distinction between an action to prevent a nuisance, unless the party may suffer some special damage, and one to prevent an act which will increase his burdens by illegal taxation, is pointed out. In the former, he has no other than an interest in common with others, while in the latter he has a special interest in the matter, distinct from that of the general public."

The case of *Newmeyer et. al.* v. *Mo. & Miss. R. R. Co. et. al.*, 52 Mo. 81 was a bill in equity filed by the plaintiffs on behalf of themselves and all other tax-payers, who were similarly situated with themselves, to set aside an order of the county court of Macon county making a subscription of $175,000,

to the captal stock of the Missouri and Mississippi Railroad Co., and to have the same declared null and void, and to have the bonds issued to pay the same delivered up and cancelled, because the county court of Macon county, one of the defendants, had no right to make such subscription and issue such bonds. The bill was demurred to and the court in an able opinion delivered by Judge Ewing say p. 84:

"It seems not to be seriously questioned that upon the facts stated in the bill, which are of course admitted by the demurrer, the plaintiffs are entitled to the relief prayed for if they can maintain this action; and the only remaining question that we deem it proper to consider is whether the plaintiffs as *tax-payers* of Macon county have stated a title for the relief they claim against the defendants; in other words, whether as such tax-payers they have such an interest in the subject matter of the suit as entitles them to maintain this action. I am not aware that this question has ever been passed upon by this court. In the case of *Hooper* v. *Ely*, 46 Mo. 505, the plaintiff as a *tax-payer* obtained an injunction against the treasurer to restrain him from paying a certain county warrant upon the ground it was issued without authority of law, and also asked an order upon the defendant, the holder, to bring it into court to be cancelled. The only interest the plaintiff had in the subject matter of the suit was that of a *tax-payer* of the county, and his right to maintain it was unquestioned.

"The only other case similar to the one at bar was that of *Steins et. al.* v. *Franklin County et. al.*, 48 Mo. 167, which was a bill in equity brought by the plaintiffs as citizens and tax-payers of Franklin county, asking for a decree declaring a contract and certain orders of the county court of said county void, and requiring a cancellation and delivery of the bonds issued under said contract, and for an injunction restraining their payment, sale or transfer, and restraining the assessment levy or collection of a tax for the purpose of their payment. No point was made as the right of the plaintiffs as tax-payers to maintain the action.

"The grounds, upon which such suits by tax-payers have been held unmaintainable, are that it requires some indivi-

dual interest distinct from that which belongs to every inhabitant of the town or county to give the party complaining a standing in court, when it is an alleged delinquency in the administration of public affairs which is called in question; and that the ownership of taxable property is not such a peculiarity as to take the case out of the rule; and that the only remedies against an abuse of administrative power tending to taxation is furnished by the elective franchise, or a proceeding on behalf of the State, or in case of an act without jurisdiction in treating the attempt to enforce the illegal tax as an act of trespass. (Denio, J. in *Roosevelt* v. *Draper et al.*, 23 N. Y. 318; see also *Doolittle et al.* v. *Supervisors, &c.* 18 N. Y. 155.) The case of *Roosevelt* v. *Draper et al.*, 23 N. Y. 318 decided in 1861 is the latest decision on the subject in the court of appeals, to which our attention has been called. We have been referred however to a number of earlier decisions in the courts of that State which hold a contrary doctrine—recognizing the right to maintain such suits; and they have been followed in several other states.

"The first of these that will be noticed is the case of *Christopher et al.* v. *The Mayor et al.*, 13 Barb. 567, which was a proceeding by injunction to restrain defendants from acting under a resolution of the Board of Aldermen relative to the re-building of a market. Held that the plaintiffs as tax-payers had such an interest as entitled them to the relief they asked; that as the necessary effect of the act complained of would be to impose a burden on their real estate, they had an interest as certain and direct as that of stockholders in a monied or other corporation. So in the case of *Milhau* v. *Sharp*, 15 Barb. 195, which was an application for an injunction to restrain defendants from constructing a railway in a certain street of the city of New York, the court say, the plaintiffs being tax-payers to a large amount, have such an interest in preventing the grant in question from being carried into effect, that they had a right to institute the suit in their own names. To the same effect is *Stuyvesant* v. *Pearsoll et al.*, 15 Barb. 244, in which it is held that the court on the complaint of a tax-payer may restrain parties from constructing railroads in the city—the granting of a right to construct which involved a breach of trust on the part of the corpora-

tion. In *De Baun et al.* v. *The Mayor et al.*, 16 Barb. 392, it was held that a person owning real estate in the city of New York and paying taxes on it, might prosecute an action against the corporation on behalf of himself and all other tax-paying citizens to enjoin them from spending the money to be raised by taxation in repairing or paving, in a manner contrary to an express law and tending to add to the taxes of the inhabitants. The same question came before the court again in the case of *Wood* v. *Draper*, 24 Barb. 187, decided in 1857, and after a thorough review of the previous decisions in that court on the subject, the court say: 'It must be regarded as the settled law of this court that it will grant its aid to restrain by injunction the imposition of any tax or burden on the tax-payers of this city contrary to law on a complaint filed by any tax-payer on his own behalf as well as on behalf of others similarly interested.' The correctness of these decisions have been questioned in some later decisions in that State which have been referred to. In *Sharpless* v. *The Mayor of Philadelphia et al.*, 21 Pa. St. 147, the plaintiffs as property-owners filed their bill to enjoin the mayor from carrying into effect certain ordinances of the city which authorized subscriptions by the city to certain railroads. The right of the plaintiffs to maintain this suit was unquestioned. In *Mercer County* v. *Pittsburg & Erie Railroad*, 27 Pa. St. 404, it is said, that as every taxable inhabitant in all measures which increase the taxes he may apply for an injunction against abuses of that character. In a more recent case in this State, decided in 1868, *Pap et al.* v. *Allen*, 58 Pa. St. 388, a bill in equity was filed by the plaintiffs, residents and tax-payers of Philadelphia, against the aldermen of the city to restrain them from exercising, which it was alleged they claimed by virtue of a certain act of assembly, known as the registry act, and charging that a large sum of money would be required from the city treasury to put the act into operation, which as tax-payers they have interested to prevent, and which would be wholly misapplied. The act being unconstitutional, the court say the right of the plaintiffs to interfere on these grounds was not disputed, neither could it have been at any time since the decision in *Sharpless* v. *The Mayor*, 21 Pa. St. 147, and *Moers* v. *City of Reading*,

21 Pa. St. 18. In both it was conceded, that the interest of a tax-payer where money was to be raised by taxation or expended from the treasury, was sufficient to entitle him to proceed in equity to test the validity of the law which proposed the assessment or expenditure. To the same effect is *Mott* v. *The Penn. Railroad Company*, 30 Pa. St. 9.

"The next case to which we refer was decided by the court of appeals of Maryland in 1869. (*The Mayor and City Council of Baltimore* v. *Gill et al*, 31 Md. 375, 394-5.) This was a proceeding to restrain by injunction, appellants, the Mayor *et al*, from carrying out the provision of an ordinance authorizing the borrowing of money to build certain railroads, which was claimed to be constitutional. The complainants were tax-payers on real and personal property situated in Baltimore, and they sued in behalf of themselves and others similarly interested. It was maintained that the plaintiffs had no standing in court, and were not entitled to ask the interposition of a court of equity to restrain by injunction the execution of the ordinance, even though it had been passed in violation of the constitution. It was further maintained that the wrong complained of, was of a public nature affecting the whole public in which the attorney-general as the representative of the State was a necessary party. It was held that the interest of the plaintiffs as tax-payers, was sufficient then to maintain the action, and that the attorney-general was not a necessary party. Bartol, C. J. in delivering the opinion of the court says: 'The case is to be distinguished from cases of public wrongs, in which the general public are alike concerned; that the complainants are tax-payers of the city, and others similarly situated constitute a class specially damaged by the alleged unlawful act, in the increase of the burdens of taxation on their property situated in the city. They have therefore a special interest in the subject matter of the suit, distinct from the general public. The court cite the cases of *New London* v. *Brainard*, 22 Conn. 552; *Webster* v. *Town of Harwinton*, 32 Conn. 131; and *Merrill* v. *Plainfield*, 45 N. H. 126 as distinctly affirming the rights of tax-payers to file a bill of this kind but we have no access to the reports at present. To the same effect are the decisions in Iowa. See *McMillan et al* v. *Lee*

County, 3 Iowa 311; *Collins* v. *Ripley County Judge*, 8 Iowa 129.

"The question was before the supreme court of Illinois in the case of *The Board of Supervisors* v. *Keady et al*, 34 Ill. 293, but its consideration was waived by the plaintiffs in error, and the court expressed no opinion upon, remarking that it the question was undetermined in that State.

"I have examined the cases cited in support of the other side or such of them as we have access to:" (These cases were *Davis and Palmer* v. *City of New York*, 2 Duer. 663 and 1 Duer 479; *Doolittle* v. *Supervisors of Brown County*, 18 N. Y. 155; *Miller* v. *Grandy*, 13 Mich. 540; *People* v. *Regents, &c.*, 4 Mich. 98, 4 Mich. 187; *State* v. *Saline County*, 51 Mo. 350; *Roosevelt* v. *Draper*, 23 N. Y. 318; *State, use of Connelly* v. *P. G. R. R. Co.*, 32 Mo. 496;. *Sayre* v. *Tompkins*, 23 Mo. 443; *Barrow* v. *Davis*, 46 Mo. 394; *Lockwood* v. *St. Louis*, 24 Mo. 20; *First National Bank of Hamilton* v. *Meredith*, 44 Mo. 500; *Vitt* v. *Owens*, 42 Mo. 512; also 4 Kernan 234; 4 Duer 192; 2 Johnson Ch'y. 428-92 433-4; 14 Eng. Ch'y. Rep. 123 and 613.) "And upon a careful examination of the subject, I am of opinion that the decisions, which affirm the right of the plaintiffs (or those standing in the same relation to such controversies) to maintain the action, rests upon more solid foundation of principle and reason than those holding the contrary doctrine. And they are commended to our approval as furnishing the only adequate remedy to the injured party from wrongs resulting from unauthorized or illegal acts like these complained of. The injury charged as the result of the acts complained of is a private injury in which the tax-payers of the county of Macon are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county except the tax-payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely the tax-payers of the county of Macon.

"I am of opinion the action is well brought in the name of the plaintiffs as tax-payers, on behalf of themselves and all others who are similarly interested, and the State is not a necessary party to the suit. The other judges concur."

This opinion is devoted principally to answering the objec-

tions to a suit of the character of the one before us arising from the acts complained of being public acts, in which the general public were affected and no person specially, and that therefore the suit should be brought by the attorney-general as the representative of the general public, and if this can not be done, then there was no legal remedy, but the parties injured could get redress only from the legislature or by the election of other public authorities, who would correct the wrong complained of resulting from the illegal act of public functionaries. That there was no remedy for wrongs of this character by resort to a court of equity to enjoin its commission, was held in *Roosevelt* v. *Draper et al.*, 23 N. Y. 218, and in *Doolittle et al.* v. *Supervisors, &c.*, 18 N. Y. 155; and the reasons for so holding are set out forcibly in those cases but are, I think, unsound as shown by the reasoning in the two opinions in *The Board of Commissioners of Clay Co.* v. *Markle et al.*, 46 Ind. 96, and *Newmeyer et al.* v. *Mo. & Miss. R. R. Co. et al.*, 52 Mo. 81, above cited. The other objection to suits of the character of the one before us, that the mere illegality of the tax complained of gives no right to an injunction in a court of equity, unless the case is brought within some recognized ground of equity-jurisdiction such as the avoiding of a multiplicity of suits, and which is so plausably presented in the opinion of Judge Cooley in *Youngblood* v. *Sexton*, 32 Mich. 409, above quoted, is not met by the reasoning in this Missouri case; but, it seems to me, it is fairly met by the reasoning of Judge Christiancy in the case of *Scofield et al.* v. *The City of Lansing et al.*, 17 Mich. 437, which was referred to by Judge Cooley in his opinion. Judge Christiancy says p. 443:

"The bill in this case is filed against the City of Lansing and Lewis C. Loomis, their treasurer and collector by fifty-three separate owners of real estate situate adjacent to and fronting on Cedar Street, and the road in continuation thereof in said city, to restrain the collection of a tax upon the lands of the several complainants along said street, for grading the same; the tax being charged to be illegal, and to constitute a cloud upon the titles of complainants. The defendants demurred to the bill and the demurrer was sustained in the court below. The first ground urged in support of the de-

murrer is misjoinder of complainants or multifariousness; they having no joint or common interest in the lands assessed. There is great conflict of authorities upon this question and a review of them would require a treatise. But in view of all the authorities, we do not understand that there is any general or inflexible rule on the subject, so far at least as relates to the joinder of parties complainant. So far as any rule can be said to exist it is one of convenience only, and must depend for its application upon the circumstances of each particular case. Story's Eq. Pl., sec. 530, Adams Eq. 309, 310; *Campbell* v. *Makey*, 1 Mylne & Craig 603. In *Kingston* v. *Price* seventy-two different underwriters upon different policies of insurance, upon which complainants had been severally sued at law for their respective subscriptions had joined in one bill, the object of which was to establish a defence which was common to all. The bill was sustained as not multifarious."

In *Murray* v. *Hay*, 1 Barb. Ch'y 59, the bill was filed by two persons owning in severalty two dwelling houses withnot common interest in the property against a defendant for a nuisance which was a common injury to both, rendering the property of each less valuable. The bill was objected to as multifarious but sustained by the court and in *Ried et al.* v. *Gifford*, 1 Hopkins 416, the bill was held not liable to this objection, though filed by several proprietors of several lands and mills and of several parts of a natural water course to restrain a nuisance caused by an artificial channel cut by a defendant on his own land, the effect of which was to draw off the water. This was held such common injury to all the complainants as to authorize them to join in one bill though the injury sustained by each was separate and distinct.

The principle involved in these cases are not to be distinguished from that in the case before us. While the property or pecuniary interest of the complainants were several, yet the action of the defendants of which the bill complained and for which relief is sought, was identical as to all the complainants. So in the present case, though the interest of complainants in the real estate upon which the tax is assessed is several and distinct, yet the action of the defendants, the proceedings on their part from beginning to end, are iden-

tical as to all the complainants, and effect them all in the same manner. Their claims are entirely consistent with each other. Adams Eq. 313, * * * * each complainant must, under the present bill, make out the same case, and no other, that he would have been bound to make upon a bill filed by him separately; and the same defence as to each complaint is open to the defendants, as if separate bills had been brought by each.

It is therefore difficult to see in advance how the defendants can be embarrassed in their defence by the joinder of the complainants: *And if they can offer no stronger objection to the bill than that fifty-nine separate suits should have been brought against them, instead of one, the bill ought to be sustained on the ground of preventing a multiplicity of suits, and a needless multiplication of costs. The substance of the complaint in the bill is the illegal imposition of the tax; and if illegal as to one, it is equally so as to the other complainants; if valid as to one, it will be valid as to all. The proceedings therefore, for the imposition of the tax will, in all probability, constitute the principal subject of litigation and this is the same as to all. It is true the title of each complainant may be disputed, and they may be each put to the proof. If any one of them should then fail in making out his title, the bill would be dismissed as to him. If in the progress of the cause it should become evident that such embarrassment must arise in consequence of the multiplicity of issues or other complications growing out of the joinder of all these complainants, as to over balance the advantage to be derived from settling the rights of all in one suit, instead of separate suits by each, it is always competent for the court (if no mode of goverance can be devised) to dismiss the bill on this account of their own motion. Greenwood* v. *Churchhill*, 1 M. & H. 546. *But we can not say a priori, that such practical difficulty is likely to arise from the joinder of the complainants. Indeed, we think, such a result highly improbable. We can not therefore sustain the objection on demurrer.*"

It is true, this was a tax in this case on lands, which was charged in the bill to be a lien on each lot of land severally for the tax upon it and was thus alleged to be a cloud upon the title of each lot of land; and this might have given a court of equity jurisdiction of a bill filed by one of the lot-owners to remove the cloud from the title of his lot. But the

fifty-nine complainants were, as the opinion shows, entertained as joint complainants, only because they had a right to file this bill to avoid a multiplicity of suits. If these fifty-nine complainants could file a joint-bill to prevent fifty-nine suits either at common law or chancery, it seems perfectly obvious, that had this tax been a mere personal tax, they would have had an equal right to file such a joint bill of injunction to prevent fifty-nine separate common law suits, which it would have been necessary to bring to recover back severally the illegal tax each one had paid; for it certainly makes no difference in giving jurisdiction to a court of equity whether the suits prevented are common law or chancery suits. I consider therefore that the opinion applies equally to the case when the tax complained of is as in the case before us a personal tax, as when it is a tax on land. The portions of the opinion which I have italicised, which contains the gist of the opinion, is as applicable to one species of illegal tax as to another; and I regard it as a satisfactory reply to Judge Cooley's opinion in *Youngblood* v. *Sexton*, 32 Mich. 406.

The real qualifications to the right to enjoin the collection of a tax totally illegal by a joint suit in equity brought by all the tax-payers is to be found clearly laid down in *Kerr et al.* v. *City of Lansing et al.*, 17 Mich. 35. The opinion of the court was pronounced by Judge Campbell. He says, p. 36:

"The bill is filed to enjoin the collection of a grading assessment upon the property described in the bill in which the several complainants have several interests. It is demurred to on various grounds, the first of which is, that it is not so drawn as to show a right in the complainants to join in the prosecution. It is usually a good ground of demurrer to a bill, that the complainants have no joint cause of action or none in which they together represent a single and entire claim or interest. But it is insisted that in order to avoid a multiplicity of suits, one action may be brought by or against all persons who are interested alike in repelling a grievance, or protecting rights, wherein their interests are precisely alike in character and affected in just the same way by the adverse claim or transaction. It is also claimed that, in such

cases, that a part may sue or be sued as representatives of all, when convenience renders such a course essential.

That such an exception is permitted in various cases, is very well settled although the precise case permitting it are not uniformally agreed upon. But in the case before us the bill is not so drawn as to call for any discussion of this subject. Up to a certain point, there is a similitude of grievances. In each case the thing sought to be restrained, is the collection of an assessment, which is alleged to be irregular. In each case, it is ultimately chargeable on land, and purports to be a lien upon it. The irregularities and illegalities in most instances affect one of the complainants as well as another. But there are some irregularities alleged which affect but a part of the complainants. The assessments on certain property is alleged to be invalid because Whitney Jones, Mary Bingham and Nelson W. Clarke, although tenants in common with Kerr and Jerome are not mentioned in the roll, but the entire amount is assessed to the two latter. So, in the case of certain lands belonging to the minor child of H. Lathrop, it is claimed the assessment is void, because not levied against the owners or occupants. It can not be pretended that any of the other complainants are interested in these private and special greivances and to this extent the bill does not, therefore, make out a common cause. If these specific irregularities should turn out to be the only ones, then the majority of the complainants would have no cause of complaint at all, and Kerr and Jones would have no common ground with the Lathrop heir, and no right to join with her in filing the bill. There is then no authority for this suit in its present form, for the plaintiffs have shown affirmatively, that they do not all stand on the same footing. The decree must be affirmed with costs."

Our conclusion is, that the weight of authority as well as reason justifies the interposition of a court of equity by injunction to stay the enforcement of an unconstitutional tax levied by a county court, provided there are proper parties plaintiffs and defendants to the suit, and it is in a proper form and is not liable to objections like those pointed out in the above case. If because of the conflict of authority and the reasons, which may be urged against

granting an injunction in any case, I was inclined to hesitate, which I am not, the decisions, which have been rendered in Virginia and in West Virginia, would turn the scale and confirm me in the conclusion, which I have announced. While in these states as in others the decisions have not been uniform as to who are the proper parties plaintiff in an action of the character of the one under consideration, yet they, it seems to me, all concur, that with the proper parties before the court an injunction will be awarded to prevent the collection of an illegal or unconstitutional tax by a county collector. This I regard as a legitimate inference from the Virginia and West Virginia decisions. (See *Bull et als.* v. *Read et. als.*, 13 Grat. 78; *Johnson et als* v. *Drummond, &c.*, and *Crockett et als* v. *Thomas, &c.*, 20 Grat. 419; *Kuhn* v. *Board of Education of Wellsburg et al*, 4 W. Va. 499; *White Sulphur Springs Co.* v. *Wellington Holly et al*, 4 W. Va. 507; *Osborn et al* v. *Stealey et al*, 5 W. Va. 85; *McClung* v. *Livesay*, 7 W. Va. 329; *John Doonan et al* v. *The Board of Education*, 9 W. Va. 246; *Corrothers et al* v. *Board of Education of Clinton District Monongalia County*, 16 W. Va. 527.)

I will now consider who are the proper parties plaintiffs in such a suit, and what is its proper form, and whether the law governing the requisite parties in such a suit has been violated in the cause now before us. It will be seen, from what I have already said, that when the courts of equity have permitted suits of this character to be brought, they have paid very little attention to the question, who were the plaintiffs in the suit. In many of these suits the plaintiff has been a single tax-payer; in other cases the plaintiffs were several tax-payers, sometimes a very large number; in other cases the plaintiff was a single tax-payer, who sued on behalf of himself and all other tax-payers similarly interested; and in other cases the plaintiffs were a number of tax-payers who sued on behalf of themselves and all other tax-payers similarly interested. In many such cases the court simply assumed jurisdiction, as though it was a matter of course; and when it discussed the question and formally decided, that it had jurisdiction, it took no notice of the form of the suit as to who were the parties plaintiffs, apparently assuming as a matter of course, that such suit might be brought in any of the four forms above indicated.

It is apparent, therefore, that such authorities will throw very little light on the question: Who are the proper parties plaintiff in such a suit? And we must principally rely on the decisions in this State to determine this question.

The case of *Bull et al.* v. *Read et al.*, 13 Grat. 79, was a suit similar to the one before us. It was brought by seventeen tax-payers of Accomac county, in behalf of themselves and all other tax-payers similarly affected by the illegal tax as alleged levied by the board of commissioners of a certain magisterial district in said county, and its object was to enjoin the collection of such illegal and unconstitutional tax. The court not only sustained the jurisdiction of a court of equity in such a case but considered the question: Who were the proper parties plaintiff in such a suit? and held them to be any number of tax-payers (in that case every inhabitant of the magisterial district) on behalf of themselves and all other tax-payers of the magisterial district similarly situated. Judge Lee in delivering the opinion of the court says p. 86:

"The mode of suing in this case and the jurisdiction of the court have both been called in question, but, as I think, upon insufficient grounds. The act in question is one necessarily affecting all the inhabitants of the district named, who in respect of persons or property were liable to taxation under its provisions; and they were many in number but had a common interest, it was allowable according to settled practice, for some to file a bill on behalf of themselves and all other tax-payers similarly situated seeking any relief to which they might all in common be justly entitled although their individual interest might be several and distinct. Calvert on Parties 28; *Cockburn* v. *Thompson*, 16 Ves. R. 321; *Chancey* v. *May*, Pr. in Chy. 592; *Attorney-General* v. *Peetis*, 2 Sim. & Stu. 67, (1 Cond. Eng. Ch'y R. 348;) *Gray* v. *Chaplin*, 2 Sim. & Stu. 647; *Blackham* v. *The Warden and Society of Sutton Coalfield*, 1 Ch'y Case 269; Mit. Pl. 137; *Milligan* v. *Mitchell*, 2 Mylne & Craig, 14 Eng. Ch'y R. 72. And it would seem where a large number of persons are thus interested in a common subject, and acts be done to the injury of the common right, the approval of the majority will neither excuse the wrong nor take away from the other parties their remedy by suit. *Bromley* v. *Smith*, 1 Swans. 8, 2 Cond. Eng. Ch'y

R. 5; See also Sto. Eq. Pl., sec. 107, 112, 114, 120; *Taylor* v. *Salman*, 4 Mylne & Craig 134, 18 Eng. Ch. R. 133, opinion of Lord Cottenham; *Wallworth* v. *Holt*, *Id.* 616; 1 Dan. Ch. Pr. 287, *et seq.*"

He then proceeds to show, that a court of equity has jurisdiction in such a case, upon the ground that, though each plaintiff might have a separate suit at law, yet to avoid a multiplicity of suits a court of equity will take jurisdiction and prevent the threatened wrong by injunction. These views seem to me to be entirely sound; and from them the conclusion would seem necessarily to follow, that the only mode, in which such a suit could be brought, would be by one or more tax-payers on behalf of himself or themselves and of all other tax-payers affected in the same manner by the illegal and unconstitutional tax complained of. Yet this decision though never disapproved either in Virginia or West Virginia has been in its spirit violated by some subsequent decisions in both States. Thus *Johnson* v. *Drummond et als.* and *Crockett* v. *Thomas et als.*, 20 Grat. 419, two cases precisely alike and involving the same identical questions, were decided together by the court of appeals. Drummond in the one case and Thomas in the other were inspectors in Accomac county appointed under a Virginia law claimed to be unconstitutional, who issued licenses to captains of vessels employed in carrying oysters taken in Virginia waters. And if the captains or the owners of any vessel engaged in this business carried it on without paying the license, the inspectors were authorized to attach the vessel and collect these license-taxes; and for that purpose there was conferred on them the same powers as on sheriffs in the collection of taxes. Drummond seized the vessels of Johnson and certain other captains under this act; and they brought a suit in chancery to stay the enforcement of the tax, which, they alleged, was illegal and unconstitutional. Crockett, another inspector, seized the vessels of certain other captains, who brought a suit against him of precisely the same character, the auditor of the State being made a co-defendant in each case.

The jurisdiction of the court of equity to issue injunctions asked in each case was sustained, it seems to me, erroneously according to the principles laid down in *Bull, &c.*, v. *Read*,

13 Grat. 78. The suit according to those principles should have been by Johnson or by Johnson and Crockett for himself or themselves and all others engaged in this business and subject to this illegal tax against all the inspectors and the auditor; and the court ought not to have permitted the institution of two separate suits of exactly the same character; for the only ground, on which a court of equity in such case had any jurisdiction, was to avoid a multiplicity of suits and to settle in a *single* suit the common question involved in all of them. It was not, however, the intention of the court to depart from the principles laid down in this case in 13 Grat.; for Joynes, judge, in delivering the opinion of the court says on page 428: "It was objected by the attorney-general, that the appellants being the owners of several vessels by distinct and independent titles and not having a common interest in all the vessels could not properly unite in the same bill to enjoin the sale of all the vessels. There is nothing in this objection. It is fully answered by *Bull* v. *Read*, 13 Grat 78."

It seems to me, the real objection, which should have been made by the attorney-general, was, that all the owners of these vessels were not united in one suit as plaintiffs instead of bringing two separate suits. I think that objection would have been sustained by this case in 13 Grat. If two suits could be brought each owner of a vessel might have brought a separate suit. Yet equity had jurisdiction only to prevent a multiplicity of suits and ought not therefore to have entertained a suit brought by a single owner of a vessel. He should have brought his suit on behalf of himself and the owner of every other vessel engaged in this business and subject to this tax claimed to be illegal and unconstitutional.

So in *Kuhn* v. *Board of Education of Wellsburg et al*, 4 W. Va. 499, the bill was filed by a single plaintiff to restrain the Board of Education of Wellsburg school district in Brooke county from collecting from the plaintiff any money assessed and levied by said board on the property of the plaintiff for the building fund for the support of schools in that district under an act of the legislature deemed to be unconstitutional. The jurisdiction of a court of equity to award the injunction, if the act was unconstitutional, was not controverted, and it was tacitly sustained by the court. This it seems to

me was in violation of the principles laid down it *Bull* v. *Read*, though the principles laid down in that case were not, I suppose, intended to be repudiated, as that case is referred to by the court (p. 580) as sustaining the jurisdiction of a court of equity. This, it seems to me, was obviously an error; for the jurisdiction of the court of equity in that case is expressly based on the ground of avoiding a multiplicity of suits; and if a single tax-payer had a right to institute the suit in a court of equity, every other tax-payer in Wellsburg district could have instituted a like suit. This they could not severally do, as the only ground, which would give a court of equity jurisdiction in such cases, was the avoiding of a multiplicity of suits. It has been decided in many case, that a single plaintiff on his own behalf can not enjoin the collection of a tax, on the ground that it is illegal or unconstitutional. This is in effect decided in each of the fifteen cases cited in the beginning of this opinion as sustaining the position, that the mere illegality of the tax or its injustice or irregularity of itself gives no right to an injunction in a court of equity; and there are very many cases to the same effect in many other States; and this doctrine may be regarded as well settled, though there are many cases, where such injunctions have been awarded on suits brought by a single plaintiff apparently on his own behalf. Many such cases have been hereinbefore referred to as cited in Pomeroy's Eq. Jurisprudence. But in most of them nothing whatever is said in reference to the proper parties plaintiff; and in a number of them the suit brought by one plaintiff is stated by the court as a suit, which should be regarded as intended to settle the entire question, and just as though it had been brought by the plaintiff on behalf of himself an all other tax-payers affected by the illegal tax. In reference to these cases Pomeroy in the note to sec. 260 Vol. 1 says:

"It should be observed that all of this group of cases (when the suit was by only one tax-payer purporting to sue for himself alone) arose in states where the courts had already decided that a suit by many tax-payers as plaintiffs or by one suing on behalf of the others, would be sustained on the grounds of preventing a multiplicity of suits, and they regarded a suit by one tax-payer alone as substantially the same

in its effect, and treated it in the same manner, citing the same precedents indiscriminately in support of the one or the other form."

These cases therefore as well as the case of *Kuhn* v. *The Board of Education of Wellsburg et al.*, ought not to be regarded so much as laying down principles in conflict with the reasoning in *Bull* v. *Read*, as cases in which the court generally thoughtlessly but sometimes designedly looked only to what they regarded as the substance of the case and disregarded the form. It seems to me however clear, that no court can ever be justified in disregarding the form of a suit to the extent of holding, that a single plaintiff may bring such a suit for himself alone, and in order to sustain the jurisdiction of a court of equity hold such a suit the same as suit brought by a single tax-payer not for himself alone but for himself and all other tax-payers alike affected by such illegal tax. I know of no other instance where a suit brought by one for himself has been regarded by the court as the same as one brought by him for the use of himself and of the whole class to which he belongs. It seems to me therefore that this whole class of cases including *Kuhn* v. *Board of Education of Wellsburg et al.* must be disapproved, so far as they permit a single tax-payer to enjoin the collection of an illegal tax only because of its illegality, they being in violation of what I regard as well settled law and admittedly a loose way of instituting such suit, the proper mode being a suit by a single tax-payer in behalf of himself and all other tax-payers affected by the illegal tax. One consequence of upholding such a suit by a single tax-payer is that, if a precisely similar suit was brought by another tax-payer in the same court and even at the same time, it too would have to be sustained.

In *White Sulphur Springs Company* v. *Holly, Treasurer, et al*, 4 W. Va. 597, a single tax-payer by his bill sought to enjoin the collection of a tax alleged to be illegally levied, there being no other ground for the obtaining of the injunction stated except the illegal levying of such tax by an officer or by one claiming to be an officer, who had not been regularlarly elected or qualified. The court held that a court of equity could not award an injunction in such a case, as there was no averment in the bill that any irreparable damage

would be done the plaintiff, if the collection of the levy was allowed to proceed; and there was an adequate and complete remedy at law for all the wrongs, which might be done the plaintiff. The case sustains the views I have expressed. But it says nothing about the question, whether, if this suit had been brought by the plaintiff on behalf of himself and all other tax-payers, it could or could not have been sustained on the ground of avoiding a multiplicity of suits.

In the case of *Osburn et al* v. *Stealey*, 5 W. Va. 86, four plaintiffs sued on behalf of themselves only alleging, that they owned real estate in the town of Shepherdstown in Jefferson county, and that the defendants were about to illegally remove the county seat from Shepherdstown carrying away the records, &c. to their special damage under an act of the legisture, which was not passed as required by the constitution, and asked an injunction. The court entertained jurisdiction and deciding that the act was constitutional refused the injunction. According to the principles I have stated the court ought evidently to have held, that a court of equity should have refused to entertain jurisdiction of the case. The decision was right, but it ought to have been placed on different grounds from those, on which it was placed by the court.

The case of *The Trustees of Clarksburg* v. *Nathan Goff*, 5 W. Va. 498, was an injunction got by a single plaintiff on his own account to enjoin the collection of a tax alleged to be illegal. The court entertained the case but held the tax legally levied. It ought not according to the views I have expressed to have entertained jurisdiction of the case, there being no ground for the interference of a court of equity stated in the bill except the illegality of the tax; and this did not legitimately give a court of equity any jurisdiction.

After all these cases had been decided in West Virginia upon principles inconsistent with the views I have expressed, several similar cases came up before the Supreme Court of Appeals in this State; and without referring to these West Virginia cases the Court really repudiated the principles, upon which they must have been impliedly based and held according to the syllabus in one of these cases, that "In a bill, filed to restrain the collection of taxes for school purposes in a certain

township the plaintiff must aver, that he sues not only on his own behalf, but also on behalf of all others similarly situated. Such averment is essential to a complete determination of all the rights affected by the suit." See *McClung* v. *Livesay*, 7 W. Va. 329. In that case the plaintiffs in the cause were forty-five tax-payers suing for themselves. The Court say on page 333:

"It is a principle of practice well established, that in a case like this one now under consideration, where all the tax-payers of the township have a common interest in the subject-matter, although their individual interests may be several and distinct, the plaintiff must aver, that he files his bill in behalf of himself and all others of similar interest; and where some of the tax-payers file such a bill, they must make a similar averment. Upon this rule of practice Judge Davis in the case of *Wood* v. *Draper*, 24 Barb. (N. Y.) 187 has collected the leading authorities, showing it to be an imperative rule and essential to a complete determination of all the rights affected by the suit. I refer to this decision especially, because made in a case famed for the ability with which it had been argued, and because it reviews the leading authorities. The same principle and rule of practice is laid down in the case of *Bull* v. *Read*, 13 Grat. 78. The object of the rule is to settle the rights of all persons similarly situated and thus prevent a multiplicity of suits."

The same was determined at the same term in *John Williams' Administrator et als.* v. *John Argabrite Treasurer of Blue Sulphur Township, Greenbrier County et als.* and *Ludington* v. *McMillan*, but these cases were never reported. (See note of reporter 7 W. Va., p. 334.)

In the case of *Wood* v. *Draper et al*, 24 Barb. 195 referred to above the court say: "The rule in reference to the proper and necessary parties is that all must be made parties, who have any interest in the result; and when a great many individuals are interested, the court will often permit a few to represent the whole; but the bill should expressly state, that it was filed as well on behalf of other members as of those, who are really made complainants. (Edwards on Parties p. 40.) One legatee may sue for his legacy without naming others interested in the same fund; but in general the plaintiff

must sue as well on his own behalf as of all others similarly situated. (*Brown* v. *Rickets*, 3 Johns. Ch'y 553 and cases there cited.) In *Chaney* v. *Ray*, (Pr. in Ch. Finch 5th Ed. 92) a bill was brought by the then treasurer and manager of the Temple Mills Brass Works in behalf of themselves and all other proprietors and partners in the first undertaking except the defendants, who were the late treasurer and managers, being about thirteen in number; and it was to call them to account for several misapplications, mismanagements and embezzlements of the corporation property in the South Sea times to the value of 50,000 pounds and upwards. The co-partnership consisted originally of but eighteen shares and those eighteen shares, in the year 1720 were split and divided into 800. The defendants demurred for that all the rest of the proprietors were not made parties, so every one had the same right to call upon them to account and then they might be harrassed and perplexed with a multiplicity of suits; but the demurrer was disallowed, because *it was in behalf of themselves and all others, the proprietors of the same undertaking*, except the defendants, and so all the rest were in effect parties. (See also *Lloyd* v. *Levering*, 6 Ves. jr. 773;) *Cockburn* v. *Thompson*, 16 Ves. 321; Cooper's Eq. Pl. 40, 41; *Good* v. *Blewell*, 13 Ves. jr., 397. In this case the bill originally did not contain the allegation that the bill was in behalf of the plaintiff and all others, but leave was given to amend by introducing a statement that the bill was in behalf of the plaintiff and all others of similar interset. (See also *Smith* v. *Swannsteadt*, 18 How. 288; *Brown* v. *Robertson*, 80 *Id.* 480.) In *Leigh* v. *Thomas*, 2 Ves. sr. 312 a demurrer to a bill, which omitted to state that it was filed on behalf of the plaintiff and the rest having similar interest was sustained. In *Baldwin* v. *Lawrence*, 2 Sim. & Stu. 18 the bill was dismissed, because it was not filed by the plaintiffs on behalf of themselves and all others equally interested with them. And in *Douglass* v. *Hasfall*, (*Id.* 184) the vice-chancellor sustained a demurrer and dismissed a bill on the ground that the bill ought to have been filed by some of them on behalf of themselves and others. This rule is also well laid down in *Ling* v. *Young*, (2 Sim. & Stu. 385.) The case of *McBride* v. *Lindsey*, (9 Hare 574–585) seems to be quite in point. Bill filed by plaintiff as a shareholder in a

company against several defendants also shareholders; the plaintiff stating there were others, and that he was ignorant of them, and the defendants had refused to disclose their names. To this bill the defendants demurred. In support of the demurrer it was alleged, that the plaintiff's case was only that of every other member of the corporation, who had sustained the same injury, and he could not sue alone. The vice-chancellor says, 'the case, therefore, is one in which the plaintiff, having a common interest in that point of view with the other parties who will be affected by the relief which he prayed, and which he has prayed for himself exclusively. Now I am of opinion he can not obtain such relief, in the absence of the other parties who are interested in this concern. If he has a common interest with all the other parties who are interested in the concern, he must sue on behalf of himself and all those other partners.' Demurrer allowed.

"So also *Whitney* v. *Mayo*, (15 Ill. Rep. 251.) The court held in that case that 'the general rule in equity is, that all persons materially interested in the subject-matter of the suit, however numerous, must be made parties, plaintiffs or defendants. The case before us falls within the exception to the general rule, on account of number, and part being unknown. But the bill has not been framed to meet the exception. It should have been filed for and on behalf of all the other communicant members,' and the decree dismissing the bill was affirmed.

"The only case, which I have been able to find, apparently adverse to this uniform current of decisions both in this country and in England and the established practice there and in our courts, is that of *Dodge* v. *Woolsey*, (18 How. 321.) In that case a bill was filed by a single stockholder of a bank, to restrain by an injunction a tax-collector of the State of Ohio from collecting a tax, upon the ground that the law imposing it was unconstitutional and void. The circuit court of the United States granted the injunction, and the Supreme Court affirmed the order. The precise point now under consideration does not seem to have arisen in that case, and it may perhaps be reconciled with the authorities before referred to. It would seem at first blush to conflict

with them, but if it does, I am satisfied that the weight of authority is entirely with the proposition, that a plaintiff, who seeks the aid of a court of equity in a case like the present, must aver that he files his complaint not only in his own behalf but for all others similarly situated. Such an averment is essential to a complete determination of all the rights affected by the suit. As has been well observed, without it the defendants might be subjected to a suit by every tax-payer in the city of New York, while on a complaint with the necessary averments a determination of the case would bind the plaintiff and all others having like rights and interest. Such at least has been the uniform averments in all similar complaints in like cases, entertained by this Court, and I do not feel warranted in this case, in departing from well-established principles and authority.

"In stating the conclusion to which I have arrived, I adopt the language of Lord Elden in *Davis* v. *Fish*, reported in the appendix to Warren on Life Insurance, p. 128: 'It must not be understood, from what I am about to say, that I give any opinion, whether the plaintiffs might or might not put such a case on the record as would entitle them to a decree for the relief they seek. The question is whether on an interlocutory motion I can do what is asked. If I could not grant the decree as asked I can not grant the injunction.' * * *

"The motion for an injunction is therefore denied, and the order for a preliminary injunction vacated."

I concur in the reasoning generally contained in this opinion and in the conclusion reached. The case of *Doonan et al.* v. *The Board of Education*, 9 W. Va. 246, was originally decided at the July term, 1879, and it followed the decision of *McClung* v. *Livesay*, 7 W. Va. 329, and decided that when a part of the tax-payers of a school district file a bill in chancery, to enjoin the collection of illegal taxes, they should file the bill in behalf of themselves and all others similarly situated, as such an averment is essential to a complete determination of all the rights affected by the suit. The bill was dismissed, because it was not brought by the plaintiffs on behalf of themselves and all other tax-payers equally affected by the illegal tax. But Judge Hoffman dissented from this action of the Court and was of opinion, that leave

should be given the plaintiffs to amend the bill by making in this manner all other tax-payers parties. The case was reheard and decided at the June term, 1876. See 9 W. Va. 246. The court without expressing any opinion except that which had been announced in 1874, reached the same conclusion. Nothing was said in the opinion in reference to the plaintiffs being allowed to amend their bill by alleging that it was brought on behalf of themselves and all other tax-payers similarly affected by the illegal taxes complained of. Nor does the syllabus say any thing on this point. I can see no good reason, why in accord with Judge Hoffman's views the plaintiffs should not have been allowed to amend their bill even by the order of the Court of Appeals. This is constantly done, when the bill shows a good case but the proper defendants are not before the Court; and I see no reason why it should not be done, when the plaintiffs show a good case but have simply failed to allege in the bill, as in such case they must, that they sue on behalf of themselves and all others similarly situated. The opinion in the case of *Wood* v. *Draper et al.*, on which these West Virginia cases are expressly based, states distinctly that the plaintiffs are allowed to amend their bill, "if it did not originally contain the allegation, that the bill was in behalf of the plaintiffs and all others, by introducing the statement that the bill was in behalf of the plaintiffs and all others of similar interest." And this seems to me obviously right. Why it was not allowed in the case of *Doonan et al* v. *The Board of Education*, does not appear, nothing being said on the subject in the report of the case.

In the case of *Douglass and McKinney* v. *The Town of Harrisville*, decided a few days prior to this case, (see 9 W. Va. 162,) it was decided that a bill of injunction will not lie to restrain the collection of a tax-assessment or a tax made or levied by the council of an incorporated town on the sole ground that the tax or assessment is illegal; there must exist in addition special circumstances bringing the case under some recognized head of equity-jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury or, when the property is real estate, throw a cloud upon the title of the complainant and the like.

In that case the suit was by a single tax-payer for himself. President Haymond on page 168 says: "If the assessment is illegal, it and all the proceedings under it are illegal and null, and the town as well as the officer is responsible to the plaintiff for damages in a suit at law. The plaintiff had a complete and adequate remedy at law for redress and relief without invoking the aid of a court of equity by the exercise of a process of injunction, and having such remedy he does not present a proper case for the exercise of equity jurisdiction." This case is in conflict really with *Kuhn* v. *The Board of Education*, 4 W. Va. 490 and *The Trustees of Clarksburg* v. *Goff*, 5 W. Va. 498, and in reference to these cases President Haymond says, (page 168): "The question of jurisdiction was not raised or made in them and was not decided in this Court, just as had been the case in a number of other cases where jurisdiction had been taken, as stated in the opinion of the court in *Dews* v. *City of Chicago*, 11 Wall. 108. In the case of *Tappin*, *Collector* v. *Merchants' National Bank*, 19 Wall. 490, I presume special cause was shown for the interposition of a court of equity, as the question of jurisdiction was not raised or discussed." This case as well as *Doonan* v. *Board of Education*, 9 W. Va. 246, were followed in *Corrothers et al.* v. *The Board of Education, &c.*, 16 W. Va. 527. It seems to me that these decisions must be regarded as settling the law on this subject in West Virginia.

I have thought it proper to review the various authorities bearing on these subjects, and to consider them maturely, not only because there has been a very great diversity of opinion on them in the different States of the Union, but also because there have been really no consistent holdings of this Court, and the questions involved have never been fully discussed. It is true our most recent decisions have in my judgment reached correct conclusions; but as our decisions have fluctuated, I have thought it important, in order to prevent such fluctuation in future, to investigate the questions involved in this cause thoroughly and settle them finally.

It remains now to apply the law as stated above to the case before us. The object of the bill in this cause was to enjoin the enforcement in Grant district in Grant county a dog-tax, which the county court of Grant county had levied on all the

owners of dogs in said county under and in pursuance of ch. 23 of the Acts of 1881, and to restrain said county court of Grant county from appropriating any money, which had been or might be collected from said tax on dogs, to the payment of the losses of private individuals from the destruction of sheep by dogs, and further to prohibit the sheriff of Grant county from paying out money, that may come into his hands from said dog-tax, for said purpose under the provisions of said act of the legislature, the ground on which the injunction was asked being, that this act was unconstitutional, null and void, and that therefore the county court of Grant had no authority to assess the tax; and especially that sections five and six of said act, which authorized the payment by the sheriff out of the fund raised by this dog-tax to private individuals in said county for losses sustained by the destruction of their sheep severally by dogs, was unconstitutional and void.

Now it is obvious from the law, as I have stated it, that a court of equity would have no jurisdiction to award such an injunction, merely because the tax was illegal, and the act, under which the tax was assessed, was unconstitutional, null and void. Nor would a court of equity have any jurisdiction to award any injunction to prohibit the appropriation of the moneys arising from this tax to the payment of losses sustained by individuals by the destruction of their sheep, merely because the act authorizing such appropriation was unconstitutional, null and void. It is equally obvious, that if a bill was properly framed, and the suit brought by proper plaintiffs against proper defendants, and this ch. 23 of the Acts of 1881 was unconstitutional, as claimed, that an injunction ought to be awarded not only to prevent the collection of the tax but also to prevent the appropriation of the moneys arising from it to the payment of losses sustained by individuals by the destruction of sheep by dogs. Such a bill when properly framed would ask this interposition of a court of equity, not merely because the tax was illegal, and this act unconstitutional, but for the additional reason that this interposition of a court of equity would avoid a multiplicity of suits, as each dog-owner and therefore tax-payer would have, unless the court of equity interposed by such an

injunction, to institute a separate suit to remedy the wrong he would suffer.

Who then are the proper parties plaintiffs and defendants in such a bill? The act complained of was the assessment illegally, as was claimed, of a dog-tax on every owner of a dog in Grant county by the county court of Grant. Every owner of a dog in Grant county, who was subject to this tax alleged to be illegal, was equally interested in having the action of the county court of Grant in assessing this tax declared illegal and void and in enjoining the collection of this illegal tax. The suit therefore should according to the principles, I have laid down, have been brought by one or more owners of dogs resident in Grant county and subject to this dog-tax on behalf of himself or themselves and all the other owners of dogs resident in Grant county and subject to this tax. It is true that this alleged illegal tax was to be collected by the several constables in the several disricts of Grant county, each constable confining his collections to the owners of dogs taxed, who resided in his district; and it is also true, as I have stated, that the complainants in such a bill must have a common cause of action, one in which they together represent one entire claim or interest. The grievance complained of must be identical in all respects, and all the complainants must stand upon the same footing. But does the fact, that this dog-tax was to be collected by one constable in one district in Grant county and by another constable in another district in Grant county cause the owners of dogs living in different districts in Grant county to have separate and distinct interests? Are not the grievances complained of identical in all respects, whether the complainants live in one or in several districts in Grant county? Do not all the complainants though living in different districts stand upon the same footing? Would it have been possible, if the dog-owners subject to this tax living in Grant county in different districts had been united in one suit, to dismiss the bill as to the residents in one district and to sustain it as to residents in any other district? This is the true criterion to be applied to ascertain whether all the dog-owners subject to this tax in Grant county should have been complainants jointly.

In the case of *Kerr et al* v. *City of Lansing*, 17 Mich. 34,

this was the criterion, which the court applied, as appears from the opinion of the court in that case heretofore quoted. But in this case, if the suit had been brought on behalf of all dog-owners resident in Grant county subject to this dog-tax, it would not have been possible to decide in favor of one complainant and against another. Their grievance was common and joint, that is, the enforcement against them severally of an illegal tax. It was to each of them a totally immaterial matter, what constable had the collection of the tax. If it were a legal tax, then the constable in each several district had a right to collect, and if illegal, no one of the constables had any right to collect it. I can not therefore see any reason, why the suit could not and should not be brought on behalf of all the dog-owners in Grant county, who were subject to this alleged illegal tax. And if it could be so brought, on the principles of law, which I have laid down, it could be brought in no other manner. The suit should have been brought therefore by the plaintiffs for themselves and all other owners of dogs subject to the tax complained of, who were residents in Grant county instead of by the plaintiffs on behalf of themselves and all other taxpayers of Grant district in Grant county.

It is obvious, if I am right as to the proper parties plaintiffs in such a bill, that all the constables in Grant county, in whose hands were any portion of these taxes for collection, were proper and necessary parties defendants instead of merely the constables in Grant district in Grant county, as was in fact the case in the bill in the cause before us.

For these reasons I am of opinion, that the bill on its face in this case was fatally defective, and the injunction prayed for ought not to have been awarded, and that the decree of April 3, 1883, must be reversed, and the bill dismissed at the costs of the plaintiffs below, and that the appellant, the county of Grant, recover of the appellees, Joseph V. Williams, George F. Cunningham and Edward Williams, its costs in this Court expended.

If the bill could on the facts appearing in the record be amended, it would not be dismissed; but the decree of the circuit court would be reversed, and the cause remanded to the circuit court with leave to amend the bill within such

reasonable time as the circuit court should fix. But this is not done; for though when this bill was filed the plaintiffs by suing on behalf of themselves and all other owners of dogs subject to this dog-tax residing in Grant county and making the proper defendants could, it is presumed have filed a good bill, as it is to be presumed these owners of dogs then occupied the same position and had the same interest, the tax in none of the districts having been, I presume, then collected: though it has been probably collected and appropriated before this time, but even if the whole of the tax in all of the districts of Grant county were still uncollected, this bill could not be amended; for if a proper bill was filed now, it could not be regarded as an amended bill, as it would make an entirely different case from that stated in the original; the parties both plaintiffs and defendants would be different, and also the main object of the bills, this suit being to stay the collection of this dog-tax in Grant district in Grant county only, while the main object of the other would be to stay the collection of the dog-tax throughout Grant county.

REVERSED. DISMISSED.

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CHARLESTOWN.

LLOYD *et al.* *v.* KYLE *et al.*

Submitted June 17, 1885.—Decided September 26, 1885.

1. Under the provisions of our statute, sec. 3, ch. 44 of Acts 1877, and sec. 3, ch. 157 of Acts 1882, no petition can be entertained by this Court for an appeal from any decree of any character, which was rendered more than five years before the petition is presented for the appeal. (p. 539.)

2. Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken. (p. 440.)

3. A party can not be granted an appeal upon a petition assigning

errors in *appealable* decrees rendered more than five years before his petition is presented, although the errors thus assigned may be the foundation of and be given effect in a subsequent decree rendered within five years, from which an appeal is also prayed. The petition must show that the party is entitled to an appeal from such subsequent decree alone, or the appeal can not be properly allowed, and if inadvertently allowed, it will be dismissed (p. 540.)

The facts of the case are stated in the opinion of the Court:

W. W. Arnett for appellant.

Ewing, Melvin & Riley for appellee.

SNYDER, JUDGE:

Stacy Lloyd, being the owner of two tracts of land, containing respectively 7,000 and 2,689 acres lying in Wetzel county, sold and by deed, dated May 8, 1847, conveyed with special warranty of title to Robert Kyle 2,000 acres to be selected by Kyle in three separate parcels from the two tracts aforesaid. In 1853 Kyle had a survey made which purported to contain 2,000 acres, but the metes and bounds of which actually embrace 4,000 acres. Lloyd having died, Kyle in 1855, brought suit in the circuit court of Wetzel county against the heirs of Lloyd to have the land partitioned and his said survey established and confirmed as the land to which he was entitled under the aforesaid deed from Lloyd. By a decree entered in said suit in 1856, the said survey was established and confirmed and a commissioner appointed to convey the land to Kyle according to the metes and bounds of said survey. Pursuant to said decree the commissioner by deed, dated April 20, 1857, conveyed the land in severalty to Kyle. Between the date of this deed and the year 1868, Kyle conveyed 3,469 acres of said survey, 1,557 acres to innocent vendees for value and 1,912 acres to his children without value.

In July 1870, the heirs of Lloyd instituted this suit in the circuit court of Wetzel county against Kyle and his grantees. They alleged in their bill that the land surveyed by Kyle and conveyed to him as 2,000 acres was in fact 4,000 acres; that the survey was fraudulent and the decree establishing and confirming the same was procured by misrepresentation and

fraud; that all the grantees of Kyle had notice of such fraud; and praying that the said survey as well as the conveyance of the land to Kyle and the conveyances by him to his grantees might be set aside, and a correct assignment made to him of the 2,000 acres sold to him by their ancestor, &c.

Several answers were filed to the bill, many depositions taken by both sides, and the cause coming on to be heard on the pleadings and proofs, the court on April 8, 1876, entered a decree in which, after stating formally its findings on the matters in controversy, it adjudged, ordered and decreed that the survey made by the said Robert Kyle, the decree entered in 1856 in the suit of Kyle confirming the same, and the deed made by the commissioner to Kyle pursuant to said decree be annulled and set aside "as obtained by the fraudulent procurement of the said Robert Kyle, except as to the 1,557 acres found to have been sold and conveyed to innocent purchaser by said Kyle, and also 443 acres of the land conveyed by said Kyle to Henry Kyle, making in the aggregate 2,000 acres to which the said Robert Kyle was entitled under his original conveyance from Stacy Lloyd." The decree then appoints three commissioners, Francis Doran, S. J. Robinson and John McCaskey and directs them to go upon the land in the bill mentioned and set apart 2,000 acres thereof according to the provisions of the deed of May 8, 1847, from Stacy Lloyd to Robert Kyle and to so set apart the same as to include the 1,557 acres conveyed to innocent purchasers by Kyle and 443 acres of the land conveyed to Henry Kyle and to give to the latter as much of his improved land as practicable, and directing the commissioners to return a plat or survey of said 2,000 acres as laid off by them and report their proceedings to the court.

At the April term 1877, the court made an order substituting A. P. Brookover in the place of Francis Doran as one of the commissioners and directing him and the two other commissioners, Robinson and McCaskey, to make the partition of the land as required by the former decree of April 8, 1876.

Upon the petition of Henry Kyle, one of the defendants in the cause, an appeal was allowed, March 19, 1881, by this Court from the aforesaid decree of April 8, 1876; and this

Court, on November 5, 1881, dismissed said appeal on the motion of the appelees, for failure of the appellant to have the record printed or to deposit with the clerk money to pay for printing the same as required by law.

Subsequently, the circuit court entered an order, February 1, 1882, substituting Augustus Wyatt for John McCaskey, who had become physically unable to act, as a commissioner, and directing him and the two other commissioners formerly appointed to make partition of the land as required by the said decree of April 8, 1876.

The commissioners made their report setting apart 2,000 acres of land as the amount conveyed by Lloyd to Kyle in the manner required by the decree of April 8, 1876. This report was not excepted to by any one. The court by a decree made January 30, 1883, confirmed said report and awarded a writ of possession to place the plaintiffs in possession of all the land embraced in the survey made by Robert Kyle not included in the 2,000 acres assigned to the grantees of Kyle by the report of the commissioners aforesaid. None of the decrees mention or direct the payment of the costs of the suit.

In January, 1884, the said Henry Kyle filed an "amended and additional petition," stating therein, he "is advised that inasmuch as the said decree heretofore appealed from was an interlocutory decree and no final decree was entered until January 30, 1883, he may still have an appeal from them notwithstanding the lapse of five years since the rendition of the former;" that "relying upon the grounds of error assigned in his former petition, and adding the still further specification of error that the decree of January 30, 1883, is within the law a repetition of the errors of the decree of April 8, 1876, he now again prays an appeal from the said decrees of April 8, 1876, and of January 30, 1883."

Upon this petition, this Court, on January 28, 1884, allowed the present appeal.

The appellees, as a preliminary question, submit that the appeal was improvidently allowed and should therefore, be dismissed by this Court. This presents an important question and one which has never been directly passed upon by this Court. Its determination involves the interpretation of

of our statute on the subject. The statute in force when the first appeal was allowed and dismissed—ch. 44, Acts of 1877—and that in operation when the present appeal was granted—secs. 1, 2 and 3 of ch. 157 of Acts 1882—are as to the question now before us precisely the same, and it is, therefore, unimportant to decide which of these statutes should control our decision here as the conclusion must necessarily be the same according to either.

The Virginia Code of 1849, provided that "no petition shall be presented for an appeal from, or writ of error or *supersedeas* to, * * * any *final* judgment, decree or order, whether the Commonwealth be a party or not, which shall have been rendered more than five years before the petition is presented." Sec. 3, ch. 182, p. 183.

Such was the statute of Virginia long before the Code of 1849, and such has been the law of that State ever since. Sec. 3, ch. 178, Code of Va. of 1873, p. 1136.

The statute of Virginia was in force in this State until April 1, 1869, when the Code of 1868 took effect. By that Code the word *final* which I have italicised in the Virginia statute was omitted.—Sec. 2, ch. 135, Code 1868.

The act of December 21, 1872, restored the word *final* and thus made the law substantially as it had been prior to the Code of 1868.—Sec. 3, ch. 17, Acts 1872-3, page 57.

This act was repealed by the Act of February 16, 1877, and this latter act, as before stated, is as to the question now before us the same as the act of 1882. It provides:

1.—"A party to a controversy in any circuit court may obtain an appeal, writ of error or *supersedeas* to the supreme court of appeals from a judgment, decree or order therein in the following cases:

First.—In civil cases, where the matter in controversy, exclusive of costs, is of greater value or amount than $100.00.

* * * * * * * * * *

Seventh.—In any case in chancery, wherein there is a decree or order dissolving or refusing to dissolve an injunction, or requiring money to be paid, or real estate to be sold, or the possession or title of the property to be changed, or *adjudicating the principles of the cause*, &c., &c.

3.—"No petition shall be presented for an appeal from, or writ of error or *supersedeas* to, *any* judgment, *decree or order*, whether the State be a party thereto or not, which shall have been rendered or made more than five years before such petition is presented."—Ch. 44, Acts 1877, p. 52.

The language of this statute, if interpreted literally, would unquestionably make the limitation of five years apply not only to *final* decrees but to all appealable *interlocutory* decrees or orders. Such a construction could not of course have been given to the Virginia statute, because it, while providing for appeals from interlocutory decrees and orders, confines the limitation of five years to *final* decrees only. It is apparent, therefore, that the Virginia decisions construing and applying the latter statute, can give very little, if any, aid in the construction of our statute. It can scarcely be supposed that the legislature could have made such a fundamental charge in the law unless it was intended for some significant purpose. The alteration, as we have seen, was first made in the Code of 1868, then in 1872 the old law was restored, and then in 1877, the alteration was again made and has been continued ever since. This persistence in effecting and preserving the change is strong evidence that it was not made inadvertently, but advisedly and for a purpose. This purpose may be readily divined when we consider it has been always held, under the Virginia statute, that there is not and never has been any limitation to the right of appeal from interlocutory decrees so long as the case is pending in court.—*Kendrick* v. *Whitney*, 28 Grat. 646.

Interlocutory decrees "requiring money to be paid, or real estate to be sold, or the possession or title of property to be changed, *or adjudicating the principles of the cause*," and especially the last, very nearly, in their nature and effect, approximate final decrees, and it is often difficult to distinguish the line that separates them; consequently, if there be any sound policy in prescribing a limit to appeals from final decrees the same policy must apply to such interlocutory decrees as possess the same right of appeal. Acts of limitation are based upon considerations looking to the peace and repose of society. The legislature may have considered with much reason, that the policy of Virginia which fixed no limit to

appeals from any class of interlocutory decrees, was unwise, and that sound policy required that there should be a limit, at least to such interlocutory decrees, as approximate final decrees in their nature and effect.

It is not required for the purposes of this cause to decide to what extent the legislature of this State intended by the act of 1877, to change the policy of the Virginia statutes. It is sufficient to say, that under our statute, no petition can be entertained by this Court for an appeal from any decree of any character which was rendered more than five years before the petition is presented. Such is the positive and unequivocal mandate of the statute, and it is susceptible of no other interpretation. It is not denied that when a party is entitled to, and obtains, an appeal from either a final decree or an appealable interlocutory decree, such appeal will bring with it for review all preceding non-appealable decrees and orders from which have arisen any of the errors complained of in the decree from which the appeal is taken, no matter how long they may have been made before the appeal was taken. *Camden* v. *Haymond*, 9 W. Va. 680; *Steenrod* v. *Railroad Co.*, 25 *Id.* 133.

In all such cases, however, the party must be entitled to an appeal, and obtain it, from a decree which was rendered not more than five years previous to the time he presents his petition. This Court, or the judge to whom the petition is presented, can not look into or regard for the purpose of granting the appeal, any errors assigned or complained of in decrees or orders made more than five years before the petition is presented, unless such errors were committed in decrees or orders which were not appealable. The party can not present his petition for an appeal and have the appeal allowed upon errors assigned in appealable decrees rendered more than five years before the petition is presented, although the errors thus complained of may be the foundation of, and given effect in, a subsequent decree rendered within five years from which an appeal is also prayed. If he is not entitled to an appeal from such subsequent decree for errors committed therein independently of any errors committed in such former appealable decrees and which are merely carried into effect by the subsequent decree, the appeal can not be allowed

and if inadvertently allowed it will be dismissed. *Moore* v. *Johnson*, 24 W. Va. 549.

According to the foregoing interpretation of our statute, which I regard as the only reasonable one that can be given to it in view of its history and unequivocal language, it is unnecessary to determine whether or not the aforesaid decree of April 8, 1876, was a final decree. It was unquestionably an appealable decree and an appeal was in fact allowed from it by this Court. It fully adjudicated the principles of the cause and settled the rights of the parties. *Middleton* v. *Selby*, 19 W. Va. 167; *Core* v. *Strickler*, 24 *Id.* 689.

The subsequent decree of January 30, 1883, merely carries into complete effect the said decree of April 8, 1876. It adjudicates no new principle or controversy. It simply confirms a report of commissioners made in pursuance of said former decree and to which there was no exception. No error in it is assigned or complained of other than that, in effect, it is a repetition of the former decree. The repetition complained of amounts merely to a suggestion that it did not set aside the former decree and correct the alleged errors therein. There is, therefore, no error in this decree for which an appeal could be properly allowed by this Court; and the present appeal having been granted more than five years after the decree of April 8, 1876, had been rendered, the appeal in this cause was improvidently awarded and must, consequently, be dismissed.

DISMISSED.

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26 541
35 490

CHARLESTOWN.

THE FARMER'S BANK, &c. *v.* SMITH & CO., *et als.*

SNYDER *v.* SAME.

THE BARNESVILLE MAN'F'G CO. *v.* SAME.

Submitted June 9, 1884.—Decided September 26, 1885.

S. E. V. & B. in September, 1874, formed a partnership under the name of J. S. S. & Co. for the purpose of manufacturing plows,

wagons, &c. All its capital was borrowed or purchased on the credit and in the name of said firm. The members of the firm with one other about six months afterwards were incorporated and organized as The West Fairmont Plow, Wagon and Manufacturing Company, for the purpose of carrying on the same business with a nominal capital of $2,150.00, consisting only of the patent right of a worthless plow owned by them in certain shares. Subsequently other parties became owners of certain shares of said stock, but under all these changes the said business was carried on exclusively in the name of J. S. S. & Co. From the time said firm was established until it was so incorporated, and thereafter until it ceased to transact business, all of its transactions, including debts incurred, and contracts and notes made by and with it, were incurred and made in the name of said firm. While it carried on said business many debts were incurred by it, which remained unpaid. The firm of J. S. S & Co. being insolvent said E. S. and another member thereof fraudulently conveyed away large amounts of real estate to avoid the payment of said debts. In suits brought by creditors of the firm to set aside these fraudulent deeds and to charge the lands so conveyed with payment of their debts, the defendant E. made defence, denying that any such partnership ever existed, or that he was or ever had been a member thereof; or that he was, or could be held liable as a partner in such firm, and claiming, that said corporation was alone liable for the payment of the plaintiffs' debts. HELD:

I. That the circumstances in proof in these causes clearly established the existence of a general partnership unlimited as to its duration between E. S. V. & B. for the purpose of carrying on said business.

II. That even if no such partnership in the name of J. S. S. & Co. had ever in fact existed between said E. S. V. and B., or between them and others associated with them, yet under the circumstances in proof in these causes, they were liable as general partners to said several plaintiffs in the same manner and to the same extent, as if a general partnership for the purpose aforesaid had existed between them.

III. That this liability continued, notwithstanding the fact, that said E S. V. and B. and K. had been incorporated and organized as a corporation for the purpose of carrying on the same business; and

IV. That the debts due to the several plaintiffs from the firm of J. S. S. & Co. having been established, and their priorities ascertained and declared, and said deeds as to the said debts set aside as fraudulent and void, the circuit court did not err in decreeing said lands to be sold to satisfy said debts without having first settled the accounts of said partners as between themselves and said partnership.

The opinion of the Court sets out the facts of the case.

Fontaine Smith, *U. N. Arnett*, *Jr.* and *J. A. Haggerty* for appellant.

James Morrow, *Jr.* for appellee.

WOODS, JUDGE:

The Farmer's Bank of Fairmont on February 20, 1879; Jacob Snyder, on February 27, 1879, and the Barnesville Manufacturing Company on July 30, 1879, instituted in the circuit court of Marion county, their several chancery suits against John S. Smith, Andrew McCray, James R. McCray, John W. Everhart, Edwin D. King, Charles W. Scott and A. S. Straight, partners doing business under the firm name of J. S. Smith & Co., Dudley E. Miller, Alexina F. Everheart, John W. Floyd, Joseph M. Fleming, Elihu Atha, Joseph R. Prickett, George V. Millan, Caroline M. Millan, William F. Martin, John M. Harden, William Vandervort, James W. Boggess, Martha L. McCray and Francis M. McCray, to set aside as fraudulent and void as to them, fourteen conveyances of real estate made by members of the said firm of J. S. Smith & Co., to certain of their co-defendents, and to enforce payment of large debts alleged to be due the several plaintiffs, from the firm of J. S Smith & Co., by a sale of the lands conveyed to said alleged fraudulent grantees. The allegations contained in these bills were substantially the same, as was also the relief sought by them. The substance of these allegations was, that the firm of "J. S. Smith & Co. was indebted to the Farmer's Bank of Fairmont in the sum of $1,567.19, the aggregate amount of five negotiable notes particularly described in the bill, made by the firm of J. S. Smith & Co., endorsed to the said bank as follows: The first by the defendants E. D. King, J. W. Everhart and J. S. Smith; the second, third and fifth, by the defendants Smith, Everhart, King and Andrew McCray; and the fourth by said Smith, Everhart and McCray, payable respectively, on December 2d and 19th, 1878, March 1st, 21st and 23d, 1879, all of which remained unpaid; that they were in like manner indebted to the plaintiff, Jacob Snyder, in the sum of $897.40, the aggregate of three negotiable notes made to him by the

firm of J. S. Smith & Co., dated September 20, 1878, payable respectively in sixty, ninety and one hundred and twenty days thereafter, all of which remained unpaid; and also to the Barnesville Manufacturing Company in the sum of $31.70, with interest and costs, being the amount of a judgment recovered by it, against said firm of J. S. Smith & Co., before a justice of said county, which was recorded on the judgment-lien docket therein, and remaining unpaid constituted a valid judgment lien on the lands sought to be sold in the said first named two causes. Other creditors of said firm who had recovered large judgments against it, were set out in the bills and said judgment-creditors were made defendants. It was further alleged that all of said several debts were incurred by said firm for moneys borrowed, materials purchased, used and consumed by it in the conduct and management of its business, and the same was so obtained and purchased upon the strength of the individual liability and responsibility of the members of said firm, and especially upon the responsibility of said Smith, Everhart and Andrew McCray, who were known to be men owning large amounts of valuable unincumbered real estate, while the others were equally well known to be men owning but little property; that the said firm of J. S. Smith & Co. on October 1, 1878, and for a long time before that date was unable, out of its social assets to pay its debts, and that to avoid the payment of these debts, the said John S. Smith, John W. Everhart and Andrew McCray, voluntarily and without consideration valuable in law, and for the purpose of hindering, delaying and defrauding said creditors, executed said several deeds to the grantees named therein, who accepted the same with full knowledge of this fraudulent intent, and prayed a cancellation of said fraudulent deeds and a sale of the lands, thereby pretended to be conveyed to satisfy said demands, and for orders of attachment in said first named causes, and for general relief. The order of attachment in the cause first brought, was issued February 21, 1879, and levied the same day on the lands owned by said firm, and on the lands of John W. Everhart, John S. Smith and Andrew McCray. Smith demurred to the first two bills (which were properly overruled.) The defendants, John S. Smith, John W. Everhart, Andrew McCray,

William Vandervort, John W. Floyd, Joseph M. Fleming and M. Harden answered the bills filed by the said bank, and John S. Smith and Vandervort answered all the bills. Others of the defendants also answered, not necessary to be further noticed. General replications were filed to all the answers. Nearly every material allegation of the bill, showing the existence of the said firm of J. S. Smith & Co., the justice and validity of the said demands, and that the said conveyances were in fact voluntary and made without valuable consideration, were admitted to be true and the answers of Smith admitted without qualification that the deed made by him to Dudley E. Miller, dated January 8, 1879, pretending to convey to him 146 acres for the sum of $2,500.00, in hand paid, was voluntary and made without consideration, and that the several notes mentioned in the bills were made by J. S. Smith & Co. and endorsed as stated therein. The answers of Everhart and Andrew McCray, denied that they ever were at any time members or partners of the firm of J. S. Smith & Co., composed of J. S. Smith, Andrew McCray, Edwin D. King, James R. McCray, Charles W. Scott and A. S. Straight, and that there ever were any contracts made or debts incurred in the firm name of J. S. Smith & Co. by their approbation, knowledge or consent, and by way of further defence they averred that, John S. Smith, James W. Boggess, Edward D. King and William Vandervort, John W. Everhart, some time during the year 1875 agreed to become and were duly incorporated as a corporation by the name of the "West Fairmont Plow, Wagon and Manufacturing Company," for the purpose of manufacturing plows, wagons, carriages, buggies, carts, drays, wheel-barrows and other farming implements; that the capital stock of the company was $2,150.00, with the privilege of increasing the same to $20,000.00, in shares of $50.00 each; that said corporators owned the stock as follows: Smith, Boggess and Everhart, each ten shares; Vandervort eleven, and King two shares; that the corporation was organized by the election of directors and other officers, and carried on the business of manufacturing plows, wagons, &c., from that time until it suspended in 1878; that said several promissory notes were given for materials furnished said corporation used in its

legitimate business, and that the complainants knew at the time the notes were executed that they were given for such material so used, and that they knew they were dealing with a body corporate, and for that reason they required the notes to be endorsed by John S. Smith, Andrew McCray and Edwin D. King.

On November 12, 1879, these three causes were consolidated, and by consent of all the parties by their counsel, they were referred to a special comissioner directing him to report the following matters:

"1.—Said commissioner shall state and make full settlement of the joint or partnership business and affairs of the defendants J. S. Smith & Co., and the accounts of its treasurer or other receiving or disbursing agent or agents, and shall by his report show distinctly what assets, real and personal, belong to said partnership or joint concern, including all sums if any, which any member or members of said partnership or joint concern owe to the same on any and all accounts.

2.—Said commissioner shall ascertain and report all the debts due and owing by said firm or joint concern, with the nature and amount of each, and the date from which each of such debts bears interest, and the order in which the same should be satisfied, and showing the date of all judgments recovered or other legal proceedings which may have been taken for the collection of any of said debts, and the present condition of the same, including costs incurred in such proceedings.

3.—Said commissioner shall ascertain and report what real estate or other property belongs to each of the defendants composing the said joint concern or firm of J. S. Smith & Co.

4.—What real estate or other property has been conveyed by the said firm, and also by each of its members, since September 30, 1878, and upon what consideration and with what intent such conveyances, and each of them, were made, and the value of each parcel of property so conveyed.

"5.—Any other matter deemed pertinent by the commissioner or desired by any of the parties."

The commissioner returned his report whereby it appeared,

that in September, 1874, the defendants, John S. Smith, John W. Everhart, William Vandervort and James W. Boggess, who were the owners of a patent-right for a plow, which proved to be utterly worthless, formed a co-partnership under the name and style of J. S. Smith & Co., composed of said four persons, for the purpose ofmanufacturing plows, wagons, carriages and buggies in Marion county; that no capital was put into the firm except said patent right; that on September 22, 1874, the firm purchased a small parcel of land containing about three acres on which their workshops were erected, and on February 10, 1875, the same parties with said Edwin D. King were incorporated as stated and organized as the "West Fairmont Plow, Wagon and Manufacturing Company," with a nominal capital of $2,150.00, owned as before stated, which on May 8, 1875, they increased to sixty-four shares of $50.00 each, of which John S. Smith and Everhart each owned sixteen shares, Vandervort eighteen, and King four and Boggess ten shares; that on June 10, 1875, Boggess transferred five shares of his stock to Andrew McCray and the remaining five shares to James R. McCray; that on December 18, 1875, Vandervort transferred his eighteen shares to Edwin D. King, and the stock of the corporation was then held by the defendants, John S. Smith, Everhart, Andrew and James R. McCray and King until September 1, 1878; Andrew and James McCray, Everhart and King each transferred one share of their stock to the defendant, C. W. Scott, and that on October 4, 1878, Andrew McCray transferred his remaining four shares to the defendant, Straight, and so the commissioner among other things reported "that the said defendants were and are all equally liable as partners to the creditors of the said firm, but that as between themselves they are partners with unequal interests in such partnership, the interest of the partners as between themselves being in proprortion to the amount of stock held by each of them in said pretended corporation." Having ascertained the debts due from and chargeable to the several firms, bearing the common firm of J. S. Smith & Co., to each of their several creditors, he ascertained the real estate owned by each member of the firm, on October 1, 1878, and the land conveyed by him since that date, and the pri-

orities of the debts chargeable thereon, and also that the deed dated January 8, 1879, made by Smith to Dudley E. Miller as well as that made by A. McCray to Elihu Atha were fraudulent and void; and that the parcel of forty and one-half acres of land which had been fraudulently conveyed by Everhart to Joseph M. Fleming, had since the institution of these suits, been re-conveyed to Everhart, and formed part of the lands reported as then belonging to him, but the commissioner was unable to, and he did not report, the state of the accounts between the different members of said firm. To this report the defendant Everhart filed four exceptions, in substance as follows:

1.—Because he reported that John S. Smith, the secretary and treasurer of the "*concern*" was not liable for $2,570.13 the apparent difference between its sales and expenses.

2.—Because it is contrary to the evidence adduced before the commissioner.

3.—Because he failed to report what part of the indebtedness of said *firm* of *J. S. Smith & Co.* is a lien on the lands conveyed by Wm. Vandervort, by deed dated August 16, 1879.

4.—And because he reported, "*the concern*" liable as a firm, not as a corporation and that Everhart and Andrew McCray were members of said firm.

The circuit court had by former decrees entered by consent sold all the real estate of the firm of J. S. Smith & Co. for $380.00 and applied the same to the payment of expenses of sale and the costs of these suits. On July 29, 1881 the court entered its decree, overruling said exceptions to the report of said commissioner and among other things adjudged, ordered and decreed, that the deed made by the defendant J. S. Smith to Dudley E. Miller bearing date January 8, 1879, conveying to him 146 acres for the pretended consideration of $2,500.00; and the deed made by the defendant Andrew McCray to Elihu Atha dated October 1, 1878 conveying to him 57 acres, were declared fraudulent and void as to all the creditors of the firm of J. S. Smith & Co. whose debts were contracted while McCray and Everhart were members thereof, but not as to those who are creditors of said firm

otherwise constituted, nor otherwise, nor farther than shall be necessary for the purpose of this decree, and that as the other parcels found to have been conveyed in fraud of creditors, have been reconveyed to said grantors since the institution of these suits, no order is made concerning the last named fraudulent deeds; and it was further adjudged, ordered and decreed, that the firm of J. S. Smith & Co. is liable to its creditors as a partnership, and that as between themselves, the members thereof, were liable as partners having unequal interests in the joint concern; that said partnership was at successive periods constituted of different persons named in said decree; that said successive partnerships incurred debts which remain unpaid, which are ascertained and declared by said decree; the social creditors are entitled to resort first to the social assets of said successive firms for the payment of their debts, and next to subject the individual property of the several members of such partnerships, so far as may be necessary for the payment of their debts, all of which are therein ascertained and decreed for, and that in case default be made in the payment thereof for twenty days, special commissioners appointed for the purpose were directed to sell said lands in the order, and on the terms prescribed in said decree.

From this decree the defendants John S. Smith and John W. Everhart appealed to this Court.

The appellants have assigned ten errors in said decree, which we have carefully considered. The unusual length of this record, covering as it does 700 printed pages, much of which has been found to be entirely unnecessary, has imposed useless labor on this Court. The defendants James M. Boggess, Edward D. King, James R. McCray, Charles W. Scott and A. S. Straight, alleged in the bills to have been members of the firm of J. S. Smith & Co., failed to appear and answer the bills and the same as to them were taken for confessed. None of the defendants who answered the bills pretended to deny the justice or validity of the demands of the several plaintiffs, as alleged in their bills. The defendants John W. Everhart and Andrew McCray alone denied their liability for these debts, not upon the grounds they were unjust or invalid, but upon the ground that no such

partnership as that of J. S. Smith & Co., as set out in the bills, ever in fact existed, or contracted these debts, and that neither of them was ever in fact a member of any such firm; and averring that said debts had been contracted by "The West Fairmont Plow, Wagon and Manufacturing Company," a corporation created and existing under and by virtue of the laws of West Virginia, the capital stock of which consisted of forty-three shares of the par value of $50.00 each, of which Everhart, John S. Smith and James M. Boggess, each owned ten shares, Wm. Vandervort, eleven, and E. D. King two shares, which was duly organized by the election of officers, &c., and that the several debts claimed by the plaintiffs as due from the firm of J. S. Smith & Co. were debts due from said corporation, and that its corporate property alone was liable to pay the same.

The first error assigned was in overruling the demurrers of the defendant Smith. No particular ground of demurrer was assigned upon the argument thereof in the court below, and upon examination thereof here, we have been unable to discover any, and we are of opinion that the demurrers were properly overruled. The second and third grounds of error assigned, were in overruling said exceptions to the report of the commissioner. The fact is well established in this record, that before the pretended corporation was created, there was a partnership created and existing in Marion county, composed of said John S. Smith, John W. Everhart, James M. Boggess, Wm. Vandervort and E. D. King, doing business under the firm name of "J. S. Smith & Co."; that the business of the firm was the manufacture of plows, wagons, buggies, &c., and that it bought and paid for all real estate it, or said pretended corporation ever owned, and erected its shops, purchased and paid for a steam engine for the same, and contracted a large amount of debts for money borrowed and materials purchased and used in the business of the firm of J. S. Smith & Co.; and it is equally well established, that from the time it commenced business on the 20th of February, 1874, until it closed up in October 1878, every debt contracted by it, and contract made so far as is disclosed in this record, was borrowed and made in the name of the firm of J. S. Smith & Co. and not in the name of the corporation—designated as "The West Fairmont Plow,

Wagon and Manufacturing Company," and that all accounts kept, and suits brought by it, were in the name of J. S. Smith & Co. It is also clearly established that this firm, at its commencement, and this pretended corporation at its organization, had no social or corporate property whatever, except the patent right of a worthless plow, which they pretended had cost $1,500.00 and that all the pecuniary means, used in the business had been procured upon the credit of the individual responsibility of the members, who from time to time became and were members of the firm of J. S. Smith & Co. It is further true that on February 10, 1875, the defendants John S. Smith, John W. Everhart, Wm. Vandervort and James M. Boggess—with E. D. King became a corporation—under the laws of this State by the name of "The West Fairmont Plow, Wagon and Manufacturing Company" and shortly afterwards organized, with a capital stock $2,150.00, *all paid in* divided into forty-three shares of $50.00 each; whereof Smith, Everhart and Boggess each had ten shares, Vandervort eleven and King two shares, and that not a dollar of stock was ever paid in, except that said Smith, Everhart, Boggess and Vandervort had put in said worthless patent right for a plow, and that King had been associated with them without paying anything except that Vandervort had assigned him some interest in said worthless patent right. After it became known that this corporation had been formed, the creditors of the firm of J. S. Smith & Co. required all notes made in the name of the firm to be endorsed by the individual members thereof, or some of them, and this was the character of the debts sued for by plaintiffs, the Farmer's Bank, and Jacob Snyder.

The only real question presented for consideration is whether these facts constituted the defendants, Smith, Everhart, Andrew and James R. McCray, Edwin D. King, Charles W. Scott and A. S. Straight, a co-partnership transacting business under the firm of J. S. Smith & Co., and liable as such partners, or whether they were only liable as a corporation?

A partnership as between the parties themselves has been defined by this Court to be a voluntary contract between two or more persons for joining together their money, goods,

labor, or all of them, with the understanding that there shall be a community of profits between them and for carrying on a legal business. *Setzer* v. *Beale*, 19 W. Va. 274; Story on Partnership, sec. 2. A partnership so far as third parties are concerned may exist without any contract between the members thereof, and even contrary to the intention of the parties. In cases where the parties intend to create a partnership between themselves, they are clearly liable to be held as partners to third persons. Among the class of cases where parties who are not partners as between themselves, are held liable as such, to third parties, is the case where parties who are really not partners, hold themselves out, or at least are held out by the parties sought to be charged as partners, to third persons, who give credit to them as such partners. Story on Part. sec. 54. When such a state of facts exist in relation to third parties, such persons so representing, or holding themselves out as partners, and upon the strength of these representations obtaining credit, money or goods, will as to such third parties, be held liable in the same manner and to the same extent as if such partnership existed by express contract. This doctrine results from principles of natural law and justice. For wherever one of two innocent parties must suffer from false confidence reposed in a third person, he who has misled the other to his loss, and is to be benefited by it ought to suffer the loss, and not the person who, trusting to his representations, has been misled by them, and this principle applies with still greater force when the party who made these misrepresentations, and proposed to profit by them knew them to be untrue at the time he made them. Story on P. sec. 64.

Applying these familiar principles of law to this case, but one conclusion could be reached. The proofs clearly show that a partnership by express agreement of the defendants, Smith, Everhart, Vandervort and Boggess, under the name of J. S. Smith & Co. was created in September, 1874, and although from time to time, some of the partners withdrew and others by consent of the remaining partners were taken into and thereby became members of the firm, it still continued to transact the same character of business at the same place under the firm name of J. S. Smith & Co. and the members

thereot were clearly liable as partners, for the debts contracted in the partnership name for the parnership use. But if there had been no proof of an actual partnership between said defendants themselves, still the facts in proof abundantly show, that as to the plaintiffs and the other creditors mentioned in the bills, they held themselves out as such partners and obtained credit, money and material for the use of the joint concern, and executed and endorsed the notes mentioned in the bills in the name of the firm of J. S. Smith & Co. This could have been done for only one purpose, and that was to induce the plaintiffs to believe they were members of such a partnership, and therefore personally liable for these debts. The creation of the little corporation with its capital stock of $2,150 "all paid in" in the shape of a patent right of a worthless plow, may have been deemed an ingenious little scheme to avoid personal liability for the debts contracted by the firm of J. S. Smith & Co. but to permit a fraud so transparent, to accomplish a purpose so dishonest, would be a reproach to a court of justice.

We are of opinion that the members of the firm of J. S. Smith & Co. as from the time constituted were individually liable to the said several plaintiffs and creditors as partners for the debts contracted in the name of said firm while they were members thereof. This conclusion in effect disposes of the second third and tenth errors assigned by the appellants as they all in substance alleged that the court erred in overruling the appellants exceptions to the commissioner's report. The said first exception was in substance the same, the finding of the commissioner, that the defendant John S. Smith was not liable for the difference of $2,570.13—between the sales made by the joint concern—and the expenses; and for finding said defendants liable as partners of the firm of J. S. Smith & Co., and not as a corporation, and for failing to show by his report what part of the indebtedness of the firm of J. S. Smith & Co., was a lien upon the lands of the defendant Vandervort.

From what has been said, appellants were liable as partners, and being so, it was wholly immaterial to plaintiffs below, how the accounts of the partners stood between themselves. The plaintiffs were not bound to see them settled

nor to aid them in doing so, and these defendants who had fraudulently obstructed them in the collection of their debts, were not entitled to further delay them—until their accounts between themselves were settled. None of these exceptions questioned the right of the plaintiffs and creditors of said firm to the relief they prayed for, and the circuit court properly overruled said exceptions for that cause, but even if it had been proper to settle said accounts, the evidence fully warranted the findings of the commissioner. It is further alleged as error that the circuit court did not decree a dissolution of said partnership. The answer to this is, it was not asked that this should be done; the existence of the partnership proved was not limited to any period of time, nor did it impose any restrictions upon the right of any member thereof to dissolve it at any time he wished to do so, and unless so dissolved, or dissolved by mutual consent, will be presumed to continue so long as the parties are in life. Story on Partnership, secs. 269, 271. The remaining errors alleged are mere incidents growing out of, and resulting from those already disposed of, and need not further be considered.

We are, therefore, of opinion, that there is no error in the decree complained of, and the same is affirmed with costs to the appellees, the plaintiffs in said three causes against the appellants and $30.00 damages.

AFFIRMED.

CHARLESTOWN.

NATIONAL EXCHANGE BANK, &c. *v.* BOYLEN *et als.*

26 554
51 257

Submitted September 9, 1885.—Decided September 26, 1885.

1. Under the provisions of the act of Congress—U. S. Rev. Stat. secs. 5197, 5198—usurious interest, *actually paid* to a national bank on discounting and renewing a series of notes, can not in an action by the bank on the last of them be applied in satisfaction of the principal of the debt. (p. 556.)

2. The said act having prescribed as the penalty for taking usurious interest, that the person paying the same may in an action re-

cover twice the amount so paid, he can resort to no other mode or form of procedure. (p. 556.)

3. Congress having prescribed the penalty for the taking of usurious interest by a national bank and likewise the remedy for recovering such interest, the States and their courts are bound thereby and they can neither add to the penalty nor apply any remedy other than that so prescribed. (p. 557.)

The facts of the case are stated in the opinion of the Court:

T. A. Bradford for plaintiff in error.

John Brannon for defendant in error.

SNYDER, JUDGE:

Action of debt, brought July 3, 1879, in the circuit court of Barbour county by the National Exchage Bank of Weston against Daniel Boylen and others, upon a promissory note executed by the defendants to the plaintiff for $1,300.00, dated June 19, 1878, and payable four months after date. The defendants pleaded *nil debent* and usury, and filed specifications of payments and set-offs. The action was tried by the court which, on July 21, 1881, gave judgment for the plaintiff for $1,300.00, the principal of said note with interest thereon from that date until paid. The defendants saved several bills of exceptions and to review the rulings of the court therein complained of they obtained this writ of error.

The facts certified show that, after the plaintiff read the note declared on, the defendants proved, that, when the note was discounted, the plaintiff charged thereon and was then paid interest thereon at the rate of ten *per cent. per annum* for the four months from its date to its maturity; that the original debt to plaintiff was $2,000.00, for which a note was made, and the plaintiff charged and the defendants paid interest thereon at the rate of ten *per cent. per annum* for the time the note had to run; that this note was renewed from time to time and at each renewal there was charged by and paid to the plaintiff interest at the same rate for the time the respective renewals had to run; that at one time there was paid $700.00 on the principal of the debt, and this reduced it to $1,300.00, the sum for which the note in suit was given; that no interest on said transactions is included in the note

sued on, and it is composed wholly of a part of the principal of said original debt. These were all the facts proved.

The defences set up by the pleas and specifications of payments and sets-off sufficiently appear from the foregoing facts and they need not be further stated. The whole object of the defence was to have usurious interest *paid* to the plaintiff, a national bank organized under the act of Congress of June 3, 1864, and doing business in this State, on discounting and renewing a series of notes of which the one in suit is the last, applied in satisfaction of the principal of the debt; that is, to have the said usurious interest paid to the plaintiff, applied in satisfaction of the note in suit. The claim is not for interest contracted to be paid and included in the note sued on, but for the application of what has been *actually paid as interest* to the discharge of the principal of the debt which still remains unpaid. The question thus presented is identically the same as that decided by the supreme court of the United States in *Driesbach* v. *National Bank*, 104 U. S. 52, in which that court held that: "Usurious interest *paid* a national bank on renewing a series of notes can not, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt." In that case the court re-affirms its decision in *Barnett* v. *National Bank*, 98 U. S. 555, in which the same ruling was made, and the latter case in addition decides that, "The act of Congress of June 3, 1864, (U. S. Rev. Stat. secs. 5197, 5198,) having prescribed that, as a penalty for such taking, (that is, taking usurious interest,) the person paying such unlawful interest, or his legal representative, may, in an action of debt against the bank, recover back twice the amount so paid, *he can resort to no other mode or form of procedure.*" The court in its opinion says: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties." 98 U. S. 559; *Farmer's National Bank* v. *Dearing*, 91 U. S. 29; *Stafford* v. *Ingersoll*, 3 Hill 38.

These decisions made by the supreme court interpreting an act of Congress, are direct authority and binding upon this

Court. National banks have been brought into existence by the national government and are regulated and controlled by that government. Their constitutionality has been sustained and as the laws of Congress, passed in pursuance of the Federal Constitution, are supreme, the States can exercise no control over such banks nor in any wise affect their operation, except in so far as Congress may see proper to permit. *Bank of United States* v. *McCulloch*, 4 Wheat. 316; *Weston* v. *Charleston*, 2 Pet. 466; *Ex Parte McNeil*, 13 Wall. 240.

Congress having prescribed the rate of interest which a national bank may charge and likewise the penalty for taking more than the rate allowed, the States are bound by the limitations thus prescribed both as to the rate and the penalty. They can impose no penalty nor enforce any forfeiture beyond that fixed by Congress; nor can they apply remedies other than those given by the act declaring the forfeiture or the penalty. *Davis* v. *Randall*, 115 Mass. 547; *Willey* v. *Starbuck*, 44 Ind. 298.

The supreme court of Pennsylvania in *Lucas* v. *Government National Bank*, 78 Pa. St. 228, and *Overhall* v. *National Bank*, 82 *Id.* 490, held that, "In an action by a national bank on negotiable paper discounted by it, the defendant may set-off the amount of interest in excess of the lawful rate paid on other transactions." But after the decision of the United States supreme court in *Barnett* v. *National Bank*, *supra*, the supreme court of Pennsylvania overruled those and other decisions and followed the decision in *Barnett* v. *National Bank*, *vide*, *First National Bank* v. *Gruber*, 87 Pa. St. 465; S. C. Brown's Nat. Bank Case 395; *National Bank of Fayette* v. *Dushane*, 96 Pa. St. 340.

This case was decided in the circuit court before the passage of ch. 104 of Acts 1882, and, therefore, that statute can have no effect upon our decision. But if it could be regarded applicable to this case, we would be compelled, under the foregoing decisions of the Supreme Court of the United States, to hold it unconstitutional and void as to all national banks in this State.

Lynch v. *Bank*, 22 W. Va. 554, is a case very different from this and the decision in that case has no application

here. That was an action to recover double the amount of the usurious interest paid the bank by the plaintiff, while this is an action in which the defendants are attempting to set-off usurious interest paid against the principal of the debt sued on. The former is expressly authorized by the act of Congress, while the latter can not be done according to the authorities before cited.

Other objections were taken in the court below and relied on in this Court by the plaintiff in error, but they are all predicated on the right of the defendants to set-off against the debt in suit the usurious interest previously paid on said debt. Having arrived at the conclusion that the defendants are not entitled to any such set-off, it is unnecessary to consider said objections as no error committed by the circuit court in them could prejudice the plaintiff in error.

The circuit court gave the defendants the benefit of their plea of usury by refusing to allow the plaintiff any interest on its debt from the time it became due until the date of the judgment. The plaintiff obtained judgment for the principal of its debt and nothing more, the interest having been forfeited by the express terms of the statute. U. S. Rev. St., sec. 5198. I am, therefore of opinion, that the judgment of the circuit court was right and must be affirmed.

AFFIRMED.

26 558
26 196

CHARLESTOWN.

AYERS *v.* BLAIR *et al.*

Submitted September 10, 1885.—Decided September 26, 1885.

1. Land of greater value than $100.00 is sold by a special commissioner for less than $100.00, the former owner files his bill to set aside said sale and recover the land, the circuit court dismisses his bill, HELD:

   The matter in controversy is the land and not the price for which it sold, and that being of greater value than $100.00, this Court has jurisdiction to review said decree. (p. 560.)

2. This Court will not dismiss an appeal upon the *ex parte* affidavit of the appellee taken without notice to the appellant stating that the appellant has assigned his interest in the suit, and that the appeal is prosecuted for the benefit and at the costs of the assignee. (p. 561.)

3. The same person can not occupy the antagonistic positions of seller and purchaser of the same subject; and, therefore, if a commissioner selling land under a decree of court becomes himself the purchaser, or has any understanding at the time of the sale, that he is to be interested in the purchase, the sale will be held void at the election of any party interested in the land. (p. 562.)

The opinion of the Court contains a statement of the facts of the case:

P. W. Morris for appellant.

R. S. Blair for appellee.

SNYDER, JUDGE:

Suit in equity instituted September 1, 1883, in the circuit court of Ritchie county by Barcus Ayers against R. S. Blair, Noah Rexroad and others to set aside the sale and conveyance of a tract of 162 acres of land purporting to have been made by Blair as special commissioner to said Rexroad. The original bill was on demurrer held insufficient, and the plaintiff by leave of the court filed an amended bill which was demurred to by the defendant, Blair, and the court by a decree entered March 8, 1884, sustained the demurrer and dismissed the bill. From this decree the plaintiff has appealed.

The material and essential averments of the original and amended bills are substantially the same and are in effect as follows: In two suits brought by certain judgment-creditors against the appellant, Ayers, and which were heard together, the said circuit court, in May 1868, entered a decree ordering the sale of a tract of 162 acres of land of the appellant to satisfy the judgments of said creditors, then amounting to over $250.00, and appointing the appellee, Blair, a special commissioner, to make said sale; that no sale was made of said land, but said commissioner, at the February term, 1882, made a report to the court in which he reported that he had, on August 11, 1879, made sale of the land to the appellee, Rexroad, for the price of $50.00, which was paid in full; that

the court, in February 1882, entered a decree in said suits confirming said report and sale and appointing said Blair a commissioner to convey the land to said Rexroad, which he did by deed dated October 19, 1882; and that said report and decree were made more than thirteen years after the sale was ordered and without the knowledge of appellant.

The bill then charges that said land at the time of the alleged sale and confirmation was worth, at least, $800.00; that said report and alleged sale were fraudulent; that Blair, the commissioner, and Rexroad, the purchaser, entered into an illegal and fraudulent conspiracy and agreement by which they agreed with each other that the said Blair should report a sale of the land to Rexroad at the nominal price of $50.00, and have the same confirmed and a conveyance made to Rexroad, and that he would then convey the one half thereof to the said Blair; that, in pursuance of this fraudulent agreement, after the confirmation of the alleged sale, Rexroad, by deed dated August 13, 1883, did convey to Blair the undivided one half of said land with covenant of special warranty. The prayer is, that said alleged sale and deeds may be set aside, &c., &c.

The appellee, Blair, upon the authority of the decision of this Court in *Rymer* v. *Hawkins*, 18 W. Va. 309, has submitted and argued a motion for the dismissal of the appeal on the ground, that the amount in controversy here is less than $100.00, and, therefore, not sufficient to give this Court jurisdiction. The counsel must have misapprehended the decision in *Rymer* v. *Hawkins;* for I can discover no question decided in that case which could form a precedent for the dismissal of this appeal. The cases are not at all analogous. That was a suit brought to enforce a lien of a judgment for $77.69 against the land of the appellant and the decree of the circuit court was, that unless said sum should be paid within thirty days the land should be sold to pay it. The value of land decreed to be sold did not appear. Upon these facts this Court decided, that as the decree against the appellant and the land was less than $100.00, she could by paying the amount of the decree prevent a sale of the land, thus making the value of the land an immaterial matter on the appeal and showing plainly that the only matter in controversy on

the appeal was the said $77.69. The case involved no controversy as to the land or its value. The whole controversy was as to whether the appellant should be compelled to pay the $77.69. If she had been willing to pay this, the land would have been relieved and the controversy ended.

But the case before us is quite different. Here the matter in controversy is a tract of 162 acres of land and not the $50.00 for which it is claimed it was sold to Rexroad. This is the converse of the case of *Rymer* v. *Hawkins*. The land is averred to be of the value of $800.00, and the demurrer admits the truth of this averment. The appellant here has no option to pay this $50.00, and thereby relieve his land. The relief he seeks by his bill is to regain the land. If the decree appealed from stands he loses his land, or its value and not the $50.00 for which it sold. The land being of greater value than $100.00, and that being the matter in controversy, this Court has jurisdiction.

The appellee, Blair, has filed before us his affidavit in which he states, that, after the dismissal of this cause in the circuit court and before this appeal was taken, the appellant here sold and assigned all interest in this suit and his title to the land in controversy to his counsel, P. W. Morris, in consideration of the sum of $25.00, with leave to the said Morris to prosecute this appeal in the name of the appellant at the costs of said Morris. He also filed with his application what purports to be a copy of the agreement between the appellant and Morris; and thereupon, he asks this Court to dismiss this appeal. The affidavit was taken without notice to any one and the alleged copy of the agreement is not proved otherwise than by the affidavit. The want of such notice and proof would be ample ground for us to disregard said papers and motion; but if all the facts stated in the affidavit had been properly proven, they would be no ground for the dismissal of this appeal. If the said agreement is, on its face, champertous and illegal as claimed, then, it could not be regarded as effectual for any purpose in a court of equity. And if it is not so, then the assignment is effectual and by its terms Morris has the right to prosecute the appeal for his use in the name of the appellant. It will not be questioned, I presume, at this late day, that a party to a suit may, during

its pendency, sell and transfer all his interest in and to the subject in controversy with a stipulation that the suit may be prosecuted to a final decree in his name for the benefit of his assignee. *Graham* v. *Graham*, 10 W. Va. 355, 384. Whether an assignment has been made in this cause we do not pretend to decide. That is a matter exclusively between the appellant and his attorney, Morris, and could not, whether decided one way or the other, affect the right to prosecute this appeal. It is no concern of the appellee, Blair, for whose use the suit is prosecuted provided it is prosecuted by some one having the legal right to do so. *Stevens* v. *Brown*, 20 W. Va. 450. In any view, therefore, the motion to dismiss must be denied.

The merits of this cause require very little discussion. The appellee, Blair, the only party defendant who has appeared in this Court, while he argued the motion to dismiss with much earnestness, has not given any considerable attention to the merits.

The law is well settled in this State that the same person can not occupy the antagonistic positions of seller and purchaser of the same subject. And if a person selling land as a commissioner of the court, becomes himself the purchaser, or has any understanding at the time of the sale that he is to have any interest in the purchase of the land sold by him, the sale will be held void and set aside at the election of any party interested in the land. *Winans* v. *Winans*, 22 W. Va. 678; *Newcomb* v. *Brooks*, 16 *Id.* 32.

The demurrer admits the truth of the averments of the bill, and in this cause the bill avers that an agreement was made between Blair, the commissioner, and Rexroad, the alleged purchaser of the land, that they would divide the land, and that in pursuance of this fraudulent agreement Blair reported the sale and had it confirmed by the court. This averment is of itself sufficient to sustain the bill. But it is also averred that the decree of sale was made in 1868, and the sale was not reported to the court until 1882, more than thirteen years thereafter, and then was confirmed without the knowledge of the owner. It is very questionable whether this was not also ground for setting aside the sale. It would certainly have been so had this appeal been taken

from the decree confirming the sale. After such great delay in the execution of a decree of sale, the court should not confirm the sale without notice to the parties interested in the sale. *Boner* v. *Boner*, 6 W. Va. 377; *Erwin* v. *Vint*, 6 Munf. 267.

For the reasons stated, I am of opinion, that the said decree of March 8, 1884, should be reversed, the demurrer to the bill overruled and the cause remanded to the circuit court for further proceedings.

REMANDED.

CHARLESTOWN.

SHENANDOAH VALLEY NATIONAL BANK v. SHIRLEY *et al.*

Submitted September 8, 1885.—Decided September 26, 1885.

(*GREEN, JUDGE, Absent.)

1. Where an exception is not taken to a commissioner's report in the court below, and the matter objected to in the Appellate Court might be affected by extrinsic evidence, the Appellate Court will not consider such objection. (p. 568.)

2. But where no exception is taken to the commissioner's report in the court below, and no error appears on the face of the report, but when taken in connection with the pleadings in the cause the error in the report does clearly appear, such error will be considered and corrected by the Appellate Court, it being impossible in such case to be affected by any extrinsic evidence. (p. 568.)

3. Where one commissioner's report shows error on its face in the calculation of interest, and it is set aside, and another report is made, which shows the balance of the debt to the time of making the report "after allowing all credits," and no exception is taken to the last report, the Appellate Court can not go back of the last report to consider errors apparent on the face of the first. p. 569.)

4. An error in the calculation of interest can be corrected by motion on notice under sec. 5 of ch. 134 of the Code. The statutory remedy however is cumulative and has not abolished petition for re-hearing or bills of review, which still may be had accord-

*Counsel below.

ing to the course of equity in the same manner as before the enactment of the statute. (p. 569.)

5. Want of notice of the time and place of the taking of an account by a commissioner is not sufficient reason for a bill of review or petition for re-hearing, such objection not having been taken, as it ought to have been, before the decree was rendered. (p. 569.)

6. Where a bill of review or petition for re-hearing is dismissed in the circuit court, and an appeal is taken, this Court may correct the error complained of without sending the cause back to allow the bill of review or petition to be heard. (p. 570.)

7. Where a commissioner's report shows, that interest on a debt audited therein is calculated at six *per cent.*, and the pleadings in the the cause show, that the debt bore nine *per cent.* interest, and the report is not excepted to, such error may be corrected in the court below on notice under the statute or by bill of review or by petition for re-hearing in a proper case or upon appeal in the Appellate Court. (p. 570.)

The facts of the case are stated in the opinion of the Court.

R. Parker for appellant.

G. Baylor for appellee.

JOHNSON, PRESIDENT:

This cause has been in this Court once before. (20 W. Va. 210.) The decrees were then reversed, and the case remanded with leave to the plaintiff to file an amended bill. It was a creditors' suit seeking satisfaction of the liens and debts set up in the bill.

The amended bill was filed; the defects in the former bill were cured; and on February 19, 1883, a consent decree was entered, and commissioners were appointed to sell the lands of the defendant, Bates, and referring the cause to commissioner Cleon Moore with instructions to ascertain and report all other real estate of the defendant, Bates, and to ascertain and report all liens general and specific binding on the real estate of the defendant, the amounts and priorities of the same, &c.

On February 20, 1883, another consent-decree was entered in the cause, reciting the sale of a tract of 163¼ acres, and confirming said report of sale. The commissioners ascertained the liens and their priorities and placed the lien of the

bank, the plaintiff, in the second class. The finding was as follows:

"CLASS 2.

"Shenandoah Valley National Bank of Winchester, against J. W. Shirley, Walter Shirley, J. G. Shirley and S. A Bates; judgment in circuit court March term, 1874, docketed July 3, 1874; balance due April 15, 1879, after allowing credits..	$1,498.02.
"Interest from April 15, 1879 to March 19, 1883	353.02.
	$1,841.04."

There was an exception to the report by the Bank of Charlestown also by John W. Grantham. The Shenandoah Bank did not except to the report.

In May, 1883, another decree was rendered reciting that the cause was heard on papers formerly read, &c., "and the report of commissioner Cleon Moore returned and filed in this cause on March 19, 1883, and the exceptions thereto, and the same being argued by counsel, the court not now passing on the exceptions to said report doth recommit the same to said commissioner with liberty to parties to produce any evidence, they may desire, touching the questions of the priorities of the debts audited against the tract of 163¼ acres of land sold in this cause, and it appearing from said report that the debt of The Shenandoah Valley National Bank of Winchestor is a lien on both the said tract of land and the house and lot in the bill and proceedings mentioned, and that the proceeds of the sale of the house and lot will be insufficient to discharge the lien on said house and lot, prior to the lien of the said bank, and that the same will have to be paid out of the proceeds of the sale of said tract of land, and it appearing that there is in the hands of George Baylor, special commissioner, after deducting the cost of sale ($62.53,) the sum of $2,114.13, it is adjudged, ordered and decreed, that said special commissioner do out of the said fund pay the costs of this cause, as audited in commissioner Moore's report, excepting those items paid under a former decree of this court in this cause, and then to The Shenandoah Valley National Bank of Winchester the sum of $1,841.04, with interest on $1,498.02 from March 19, 1883, the amount audited in its favor in said commissioner's report."

On May 30, 1883, another decree was rendered overruling the exceptions to commissioner Moore's report and confirming the same: "And it appearing from said report that the sale of the house and lot in Middleway belonging to said S. A. Bates will be required to liquidate the liens in said report audited" it was agreed, &c., that commissioners therein appointed should sell said house and lot, &c.

On December 14, 1883, another decree was rendered reciting the sale of the house and lot and confirming the sale and directing the commissioners out of the funds in his hands to pay any unpaid costs and the residue to The National Bank of Martinsburg or to E. Boyd Faulkner, its attorney, on the debt audited in Class 1 of commissioner Moore's report.

Another decree was rendered, stating that commissioner Baylor submitted a report showing the collection of the first deferred payment on a tract of land amounting principal and interest to $2,307.26. The report was approved, and the commissioner was ordered to pay more costs, the balance to be paid on a debt audited in commissioner Moore's report in Class 3, and was directed to collect the second deferred payment as soon as due and report to court.

On December 19, 1884, the cause was again heard, and commissioners Trapnell and Beckwith filed a report showing certain distribution of monies in their hands and that they had collected the first deferred purchase-money bond of Margaret A. Bates, and had in their hands for distribution $307.17, and there being no exception to said report, it was confirmed and the said commissioners were directed to pay any unpaid costs in the suit and to pay the balance to the National Bank of Martinsburg or its attorney on the debt audited in Class 1 of commissioner Moore's report.

The cause was again heard February 24, 1885, on the papers formerly read in the cause and the report of special commissioner Baylor, which showed he had collected the last deferred instalment of purchase-money on land sold in the cause to W. G. Bates, Helen Bates and Mary B. McCoughtry amounting principal and interest to $2,437.86, and after deducting $49.75 commissions leaving a balance of $2,388.11 for distribution, and there being no exceptions

to the report it was confirmed, "and the court being of opinion that a petition for re-hearing can not be filed to a final decree at a subsequent term to that, at which the decree sought to be re-heard is entered, and that treating the same as a bill of review, the complainant not having excepted to the commissioner's report filed March 19, 1883, can not now bring the question of notice before this court by bill of review, doth dismiss the petition for re-hearing or bill of review filed by The Shenandoah Valley National Bank of Winchester, and doth adjudge, order and decree, that George Baylor, special commissioner, out of the funds in his hands for distribution do pay to the National Bank of Martinsburg, or to E. Boyd Faulkner, its attorney, the sum of $720.52, the balance due said bank on its debt audited in Class 1 in commissioner Moore's report returned and filed in this cause March 19, 1883, and to George Baylor, administrator *de bonis non, c. t. a.* of Robert Florence, the sum of $1,371.22, the balance due on the debt audited in Class 3 of said report in favor of George Baylor, trustee of John W. Grantham and others, and to John W. Grantham, assignee of the Bank of Charlestown, the sum of $296.37 on the debt audited in said report in Class 4," &c.

The petition for re-hearing or bill of review was filed by the said bank, claiming that its debts were judgments bearing interest at nine *per cent. per annum*, as alleged in its bill filed in the cause. It alleges no notice was given it of the taking of the account by the commissioner. It complains that the report did not give interest at nine *per cent.*, but only for six; that it was its right to have interest on its debt at nine *per cent.* until paid, and alleges that there is due to it yet over $600.00. It alleges that the first error as to the calculation of interest appears on the report March 7, 1876, and the same error is repeated in the subsequent reports. It prays a re-hearing of so much of the decree of May 30, 1883, as confirmed the commissioner's report filed March 19, 1883, and of any and every other decree in the cause, which may be construed as having fixed the amount of its debt; and that the cause may be recommitted to the commissioner to ascertain the true amount of its debt. The said bank appealed from the decree of February 25, 1885, and May 30, 1883.

The decrees entered in this cause show a strange practice. Why there should have been some eight decrees rendered in this cause of the character of those described above, we can not imagine. It is difficult to ascertain, which of them is the final decree; and as it is unnecessary for us to decide that question in this cause, we decline to do so. It clearly appears from the face of the commissioner's report of March 19, 1883, that the commissioner calculated the interest on the balance found due the bank at six *per cent. per annum;* and that had it been calculated at nine *per cent.*, at that date March 19, 1883, the bank would have been entitled to about $176.00 more than was allowed it. But it is said this does not appear on the face of the report, and there is no exception to the report; that it can not be said that interest should have been calculated at nine *per cent.* without the aid of extrinsic evidence. It is true that where an exception is not taken in the court below to a commissioner's report, and the matter objected to in the Appellate Court might be affected by extrinsic evidence, the Appellate Court will not consider such objection. (*Evans* v. *Shroger*, 22 W. Va. 581, and cases therein cited.) But where no exception is taken to the commissioner's report in the court below, and no error appears on the face of the report, but when taken in connection with the pleadings in the cause the error in the report does clearly appear, such error will be considered and corrected by the Appellate Court, it being impossible in such case to be affected by any extrinsic evidence. Here the bill distinctly charges that the two judgments set up therein were recovered in the circuit court of Jefferson county and bore interest at nine *per cent. per annum.* This is not controverted in the suit and must be taken as true. The commissioner in his first report calculated the interest at nine *per cent.* If those resisting the enforcement of these judgment liens had controverted the fact, that the judgments bore interest at nine *per cent.*, then the plaintiff would have been compelled to prove the allegation in his bill in the proper mode. If it were admitted, that the judgments bore nine *per cent.* interest, then until reversed they would be enforced with such interest.

But it is claimed by the petitioner, that he is entitled to have the whole account retaken. He claims there was an error

in the first report in the calculation. He can not go back of the report of March 19, 1876. That ascertains a balance "after allowing all credits" of $1,498.02. There was no exception to the report, and the evidence before the commissioner was not therefore brought up. (*Thompson* v. *Catlett*, 24 W. Va. 525.) We must therefore conclude, that the report is correct in ascertaining the balance. The error of not allowing interest on the balance at nine *per cent.* is apparent. How could the plaintiff after failing to except take advantage of the error? He might have done so by notice given under sec. 5 of ch. 134 of the Code. As it was a mere error in calculation, that would have been the best mode to correct it. But he gave no notice as required by the statute to correct such error of calculation. Then what can he do? Must the decree appealed from be affirmed? Is he prohibited by sec. 6 of ch. 134 from taking his appeal, he not having given such notice, and no motion founded on such notice having been overruled in whole or in part?

The statutory remedy is cumulative and has not abolished petitions for re-hearing or bills of review, which still may be had according to the course of equity in the same manner as before the enactment of the statute. (*Kendrick* v. *Whiteny*, 28 Grat. 646.) Then the petition of plaintiff may be treated either as a petition for a re-hearing or a bill of review; it matters not which. If the decree sought to be reviewed was a final decree, then a bill of review might have been filed; and if it was not a final decree, a petition for a re-hearing was a proper remedy, and it would be treated as one or the other, as circumstances might require. (*Kendrick* v. *Whitney*, 28 Grat. 646; *Sturm* v. *Fleming*, 22 W. Va. 404.)

The court below held that the plaintiff not having excepted to the commissioner's report, he could not now bring the cause again before the court by bill of review, on the ground that he had no notice of the taking of the account. This is true. Want of notice of the time and place of a commissioner taking an account is not sufficient reason for a bill of review or petition for re-hearing; such objection not having been taken, as it ought to have been, before the decree was rendered. (*Winston* v. *Johnson's Ex'ors*, 2 Munf. 305.) But the error in calculation is a sufficient ground either for a bill

of review or petition for re-hearing. But as the error may be here corrected on appeal from the decree settling the principles of the cause, this Court will now require the error to be corrected. The report of the commissioner ought not to have been confirmed, so far as it gave only six *per cent.* interest on the balance found due the plaintiff. The report should have been modified by allowing him interest on the balance of $1,498.02 at nine *per cent.*

The decree of February 25, 1883, so far as it dismissed the plaintiff's petition or bill of review, is reversed with costs to the appellant, and the decree of May 30, 1883, confirming the commissioner's report is reversed, and this cause is remanded with instructions to modify said report as herein indicated, and to do whatever is necessary to cause the said balance found by said report due the plaintiff with interest thereon at nine *per cent. per annum* until paid to be paid to plaintiff and appellant less any sum or sums already paid to him on said lien.

Reversed in Part. Remanded.

CHARLESTOWN.

McCoy *v.* Bassett *et al.*

Submitted June 17, 1885.—Decided September 26, 1885.

1. Where there is a sale of land by the acre, a right of survey exists whether expressly reserved or not; and if no time is limited for making the survey, it may be made at any time before the whole business is closed between the parties. (p. 575.)

2. Where a contract was made for sale of a boundary of land set out therein for $5.00 per acre providing for the terms of the payment and giving immediate possession of the land, and the bill filed for the specific performance of the contract alleged the making thereof, the price per acre to be paid and the terms of payment, and that by survey made by plaintiff it amounted to a specified number of acres, and alleging the failure to pay the purchase-money, and praying a specific performance, Held:

The bill is sufficient and demurrer thereto was properly overruled. (p. 575.)

3. Although the record shows, that the defendants were entitled to an abatement amounting to $41.25, yet, as that is not sufficient to give this Court jurisdiction, the cause will not be reversed for that reason, but, as the Court has jurisdiction on other grounds, the decree will be corrected and affirmed. (p. 576.)

4. Where by consent of the vendor the vendee sold a portion of land to a third party with the understanding that, if he paid for it to the original vendor at the price he sold it for, the deed should be made to him, and he fails to perform the contract, no abatement should be allowed on this ground. (p. 576.)

The facts of the case are fully stated in the opinion of the Court:

G. H. Umstead and *M. R. Crouse* for appellant.

J. M. McCoy and *T. P. Jacobs* for appellee.

Johnson, President:

Charles P. McCoy in December, 1882, filed his bill in the circuit court of Wetzel county, against Aaron Bassett, Thomas Cunningham and Francis M. Strait, for the specific performance of a contract for the sale of land, dated January 15, 1879. The contract was signed and sealed by all said parties and witnessed, that Charles P. McCoy had sold the defendants a certain tract of land by metes and bounds, setting them out, and containing an unknown number of acres "to be ascertained by survey," for the sum of $5.00 per acre, to be paid as follows: "$100.00 on or before the first day of May, 1879, and the balance of the purchase-money to be paid in three equal annual payments with interest at the rate of six *per cent. per annum* from the first day of May, 1879, till paid." Possession was at once given by the terms of the contract. The bill set forth the contract, and that, shortly after it was made, the plaintiff caused a survey to be made of said tract of land, and it was ascertained to contain 138 acres and eighty-five poles; that he had received only $100.00, and the balance of the purchase-money was due and unpaid; that the defendants were in quiet and peaceable possession of the land; that he had executed a deed with general warranty for said

land and files the same and prayed a specific performance of the contract, and a sale of the land, if necessary to pay the purchase-money; and for general relief.

The defendants demurred to the bill on the following grounds: First.—The bill does not allege that defendants were informed of the number of acres the tract contained. Second.—The bill does not state when the survey was made. Third.—It does not state demand for payment of balance of purchase-money. Fourth.—It does not state, that deed was ever tendered. Fifth.—It does not state amount due. Sixth. —Being a sale by the acre it was the duty of McCoy to survey, and he must do this before the amount can be ascertained, and demand must be made before balance is due. The court overruled the demurrer to the bill. Bassett filed his separate answer, in which he claims, that he was the purchaser of the land and that Cunningham and Strait were his sureties. He avers defects in the title to a part of the land; also that plaintiff never informed him that he had surveyed the land, nor did he inform him of the number of acres the tract contained. He denies, that plaintiff had the land surveyed. He avers, that some time in the year 1880 the plaintiff with the consent of this defendant sold fifty-one acres of said land to one Lot Martin and agreed to take Martin for it and relieve him as to so much, and under said agreement he let Martin have possession of the said fifty-one acres. He avers the payment of not only the $100.00 admitted in the bill, but $94.50 more, which plaintiff accepted on the remainder of the land after Martin's fifty-one acres should be taken out, and avers that the boundaries in the deed tendered are different from the contract, &c.

Cunningham and Strait jointly answered the bill. In their answer they also say the land was bought by Bassett alone, and they were his sureties.

To these several answers the plaintiff replied generally.

An order of survey was entered, which was returned and showed that the tract of land contained 124 acres and thirty-eight poles. The report further shows, that the land claimed by the defendants as "school lands" was 8 41-80 acres, and that the land sold to Lot Martin, included the "school land" and was 51 55-160 acres. After the contract had been made

to the three defendants on May 28, 1880, the following contract was executed:

"Articles of an agreement entered into by and between Charles P. McCoy, of the first part, of Sistersville, West Virginia, and Lot Martin and Frank Strait and Aaron Bassett and ———, of Wetzel county and State aforesaid:

"Whereas, the said Charles P. McCoy sold to Aaron Bassett and others part of a certain tract of land lying on or near Crow's run in Wetzel county on January 15, 1879, at the rate of $5.00 per acree, to be paid as follows: $100.00 on May 1, 1879, and the balance of the purchase-money to be paid in three equal annual instalments, with interest at the rate of six *per cent. per annum* from May 1, 1879: Now, said Aaron Bassett has agreed to sell unto said Lot Martin a part of said tract at the rate of $5.00 per acre, as mentioned in his purchase of said McCoy, all the land enclosed in the following boundaries: Beginning at a pine, a corner in said Strait's land; thence S. 7° E. — poles to a run, "crossing" said line near Martin & Lowry's saw mill; thence up said run to the forks; thence up the right hand fork to the forks; thence up the left hand fork with its meanders; thence toward the Cunningham line near Metoll's house; thence —— poles N. 37° west along Cunningham's line to a hickory corner; thence along the division line run by John Low, south 59 west 82 poles to a white oak in line to a corner to said Strait's; thence west 20 poles to said beginning, the area to be ascertained by survey. It is agreed that if said Lot Martin pays to said McCoy the said $5.00 per acre as stipulated by Aaron Bassett, Frank Strait and Thomas Cunningham, then the deed is to be made by said McCoy to Lot Martin instead of Aaron Bassett, and said Bassett, Strait and Cunningham are to be released from the obligation to pay for said land paid for by Lot Martin. The said Frank Strait and ——— agree to secure to said McCoy the payment of the purchase-money for said land.

"Witness the following signatures and seals, May 28, 1880.

"Charles P. McCoy, [seal.]
"Lot Martin, [seal.]
"[seal.]
"[seal.]
"[seal.]"

In the transcript these three last seals were omitted and were supplied by agreement of counsel. On January 5, 1883, the plaintiff wrote the following letter to the defendant Bassett:

Sistersville, January 5, 1883.

"Mr. Aaron Bassett:

"Dear Sir:—Two letters I have got of yours, but neither of them in answer to mine sent you last November. I gave the papers to Mr. Furnell, at the last term of the Wetzel circuit court, to calculate and tell me how many acres you would have and how many Lot Martin would get. I have not heard from him since so I can not tell you how much is due on the land I sold you. But I am in a great need of the money. I expect to meet Mr. Furnell at the office of McCoy & Jacobs, in New Martinsville, the 12th day of this month, and then I can tell more about our matters. The mails have been so irregular is the reason I did not answer your first letter, and I could not tell you until I heard from Mr. Furnell. I wrote to Mr. Furnell last November to send me the plats, &c., but they have not come to hand yet. I remain your friend, &c.

"Charles P. McCoy."

McCoy had the fifty-one acres surveyed for Martin and put him in possession of it; and McCoy and Bassett were both present, when the survey was made. It was the understanding, that at the time the land was sold to Lot Martin, there were $100.00 then due, which Martin was to pay. Martin did pay much more than that, but he had bought other land from McCoy before that, which adjoins the fifty-one acres. There is much said in the depositions about the sale to Lot Martin, and while neither Strait nor Cunningham knew of the sale at the time it was made, yet both in their depositions say they are willing for him to have the fifty-one acres.

On September 22, 1883, the court rendered a decree approving the report of the surveyor reciting that the survey "was accepted by the plaintiff and defendants as correct, that the quantity of land sold defendants by complainant amounts to 124 acres and one rood," and also recites the boundaries; and further, "the court being of opinion that for anything alleged or proved by the defendants under the circumstances of the case" the contract ought to be specifically enforced, and ascertains, that the amount of the pur

chase-money due is $583.47 on that day, "allowing all payments and deductions," and unless paid within thirty days by defendants, commissioners then appointed were directed to sell the same for the payment thereof, and ordering the plaintiff, before he could have any benefit under the decree, to execute and file with the papers of the cause a deed conveying to the defendants by metes and bounds as set out in the report of the survey the said land with general warranty.

From this decree the defendants appealed and assign as error, first, that the demurrer to the bill ought to have been sustained. It seems to us the bill is sufficient; that every necessary allegation and charge is contained therein. It was not necessary under the circumstances of the case, that the deed for the land should have been filed with the bill; there was a controversy about the quantity of land. The bill alleges, that a survey had been made; but where there is a sale of land by the acre, a right of surveying exists whether expressly reserved or not, and if no time is limited for making the election to survey, it may be done at any time before the whole business is closed between the parties. (*Nilson* v. *Carrington*, 4 Munf. 332; *Carter* v. *Campbell*, Gilm. 170; *Crawford* v. *McDaniel*, 1 Rob. 448.)

The appellants assign for error, that the boundaries in the contract are not the true boundaries of the land. It is true they are not the same as the boundaries set out in the surveyor's report; but the defendants can not now object, as they accepted the boundaries set forth in the surveyor's report, as showing the land they bought.

It is also objected, that the court did not decide, that Bassett alone purchased the land, and that the other defendants were his sureties, and did not decree that the deed be made to Bassett alone. There was no error in this. McCoy, as his contract shows, sold the land to the three defendants jointly. Whatever arrangements they made among themselves, as to who should have the land, did not concern McCoy. The defendants Strait and Cunningham can, if they choose, convey to McCoy.

It is also assigned as error, that eight and one fourth acres of the land were not the property of McCoy, but were sold

as school-land and bought as such by Bassett after the contract was made, and that he paid $3.50 then and gave bond and security to pay $10.50 more, the residue of the purchase-money. What he was thus compelled to pay might be allowed here, if the facts with reference thereto clearly appeared, showing defendants entitled to the abatement, but they do not; and we therefore decline to make the abatement claimed.

It is also assigned as error, that no abatement was allowed for the fifty-one acres sold to Lot Martin. There was no error in this. All the defendants agree, that Bassett was the real purchaser of the land, and it was he and not McCoy who sold the land to Martin. The contract exhibited by the defendants shows, that Bassett sold the fifty-one acres to Martin, and in that contract it is provided as follows: "It is agreed that if said Lot Martin pays to said McCoy the said $5.00 per acre, as stipulated by Aaron Bassett, Frank Strait and Thomas Cunningham, then the deed is to be made by said McCoy to Lot Martin instead of Aaron Bassett," &c. McCoy was willing to accommodate Bassett but surrendered none of his rights under his contract by so doing.

There is no error in said decree; and it is therefore affirmed.

AFFIRMED.

CHARLESTOWN.

FISHER'S HEIRS v. CAMP'S HEIRS.

Submitted June 24, 1885.—Decided September 26, 1885.

1. In a real action, if the defendants plead not guilty, they may afterwards abandon their defence and by leave of the court withdraw the plea of not guilty and put in a plea of disclaimer, or they may disclaim by a simple entry of record in the case all interest in or title to the land in controversy. But if only one of the defendants wishes to abandon the controversy, the court should not permit the withdrawal of the plea of not guilty, but the defendant desiring to abandon the controversy should be allowed to do so by such simple entry of disclaimer on the record-book; and there should be no judgment for costs subsequently incurred against him. (p. 580.)

2. When a new trial has not been asked in the court below by the plaintiff in error, the appellate court will review none of the opinions or rulings of the court below during the trial of the case before the jury, though such opinions and rulings be made a part of the record by formal bills of exceptions or otherwise. (p. 580.)

GREEN, JUDGE, furnishes the following saatement of the case:

On May 18, 1847, George Fisher, jr., instituted his writ of right in the superior court of law and chancery for Lewis county, then in Virginia, against James M. Camp, to recover a tract of 200 acres of land in said county. The demandant filed his account October 4, 1847, and the tenant then filed his plea, and the demandant filed his replication thereto, and thereupon the *mise* was joined between the parties. The tenant, James M. Camp, having died, the action was on September 29, 1849, revived against his heirs. And the demandant having afterward died, the action was on May 17, 1862, ordered by the court to proceed in the name of his heirs. On September 7, 1874, one of these heirs having died, the action was ordered to be proceeded with in the name of his heirs in lieu of their ancestor. Two of the seven heirs of tenant, James M. Camp, the record states, on March 11, 1875, appeared and disclaimed any interest in the land in controversy. No formal disclaimer was filed by them, but a simple entry was made on the record, as above stated. Others of the heirs of the demandant having died, the action was revived in the names of the heirs in lieu of their deceased ancestors. A survey of the land was made by order of the court during the progress of the action.

On March 6, 1877, a jury was sworn to say the truth, whether James M. Camp's heirs have more right to hold the tenement, which George Fisher's heirs demand against them by their writ of right, or George Fisher's heirs have the more right to have it, as they demand, and a true verdict give according to the evidence. During the trial of the case by the jury, after the demandants had concluded their evidence, and the tenants had given some evidence before the jury on the *mise* joined, the tenants showed the fact, that certain of the demandants were infants, and thereupon they moved the court to arrest further proceedings in the action on that ac-

count, and thereupon the demandants moved the court to allow them to introduce George Fisher to the stand as next friend for these infants and to prosecute this action for them. As stated on the record, it not appearing to the court that any parties would be surprised or prejudiced by so doing, it was ordered that George Fisher be introduced into this action in the character of next friend to these infants. To this the tenants objected, but their objection was overruled. On March 8, 1877, the jury rendered their verdict finding that the demandants have more right to have the tenement, which they demand against the tenants, than the tenants have to hold the same, and assessing the demandant's damages at one cent. Thereupon it was considered by the court, that the demandants recover against the tenants their seizin of said tenement containing 200 acres, giving its boundaries, to hold to the said demandants and their heirs quit of said tenants and their heirs forever; and the court rendered judgment for the demandants for their one cent damages and their costs against the tenants or defendants; and a writ was granted them to have their seizin.

During the trial of the issue before the jury, the record shows, the tenants excepted to certain rulings and opinions of the court and took a bill of exceptions. This bill of exceptions shows, that the tenants offered in evidence certain deeds, whereby certain of the demandants after the institution of this action and since 1862 had conveyed their undivided interest in the 200 acres of land in controversy to certain others of the demandants. The demandants objected to these deeds being read to the jury as evidence in this action, and the court sustained their objection and refused to allow any of these deeds to be read to the jury. To this action of the court the tenants excepted, and a formal bill of exceptions was taken and made a part of the record.

To this judgment of the circuit court of Lewis rendered March 8, 1877, the tenants, the heirs of James M. Camp, obtained a writ of error and *supersedeas*.

J. M. Bennett for plaintiffs in error.

John Brannon for defendants in error.

GREEN, JUDGE:

This will probably be the last, as it is the only, case of a writ of right, which has ever come before this Court. The writ of right has been abolished as a remedy in Virginia since July 1, 1850. (Code of Virginia of 1849, ch. 136, sec. 38; Code of Virginia, of 1860, p. 613.) And as a remedy the writ of right never has existed in West Virginia. (Code of West Va., ch. 91, sec. 38.) So that no writ of right can come before our Court, unless the action was brought prior to July 1, 1850, that is, unless the action has been pending more than thirty-five years. And despite the great delays, which sometimes occur in the prosecution of suits, it rarely happens that a suit is pending that length of time. This suit has however been pending more than thirty-eight years, there having been during all this time but little done in it except to continue it in the circuit court from term to term. The principal question discussed in this Court by counsel is, whether, if pending an action of a writ of right the demandant convey by deed the tenement, the subject of controversy, to a third party, he can in any case have a judgment in his favor against the tenant.

It is well settled, that as the law was, when this action was brought, if it had been an action of ejectment, the plaintiff could not recover, if pending the action he by deed conveyed away the premises to a third party, though this is no longer law, it having been changed by the statute since the institution of this suit. (*Johnston* v. *Jarrett*, 14 W. Va. 237 and *Johnston* v. *Griswold & Rogers*, 8 W. Va. 240.) It is earnestly insisted by the counsel for the defendants in error, the demandants below, that this never was the law in writs of right, but that the demandant in a writ of right could recover, if he showed the better title, when this action was instituted, though pending the action he conveyed the tenement demanded to a third person. And this is the enquiry which would have arisen in this action, if the tenants had moved for a new trial, and when the court below overruled their motion, they had either filed a bill of exceptions or else simply objected and had this objection noted of record. In this case the court refused to permit the tenants to prove, that pending the action the demandants had conveyed this tenement the subject

of controversy by deed, and the tenants excepted to this action of the court and had their exceptions noted on the record. If the court below erred in this, and the tenants had asked a new trial on the ground of this error, they would have been entitled to such new trial; and if it had been refused, and the record showed that they either excepted or objected to this refusal, this Court would have considered this question, and if we had concluded the court below erred, we would have reversed the judgment and awarded such new trial. But as no new trial was asked, this Court can not review this question and award a new trial never asked of the court below, as we have repeatedly decided. (*Danks* v. *Rodeheaver*, *supra*.)

This question thus elaborately discussed can not be considered by us, as no new trial was asked by the tenants in the court below. And for precisely the same reason we can not review the question, whether the court below erred in permitting the demandants pending the trial before the jury to introduce George Fisher into the case to stand as the next friend of certain infant demandants and prosecute this suit for them. We therefore decline to express any opinion as to the action of the court below on these points; no new trial having been asked on this account, on the authorities above cited we can not consider the question whether the court below did or did not err in this matter. I would however refer to *Syme* v. *Jude*, 3 Call 522 as throwing some light on the power of a court independent of statute-law to permit an amendment of the record, after the jury has been sworn.

The only other error claimed to exist in this case is, that the court below erred in rendering judgment against all the defendants, when two of them in March, 1877, disclaimed on the record any interest in the tenement the subject of controversy. This disclaimer was by a simple entry to that effect on the record-book, which the counsel for the defendant in error argues was insufficient, as such disclaimer should have been by deed or by plea of disclaimer. In *Bryan* v *Hyre et al.*, 1 Rob. 94, it was decided, that in an action to recover a freehold estate in land, if the defendant relies on a disclaimer of any interest in the land in controversy, such disclaimer can not be shown by parol proof but must be shown

by a deed of the defendant, unless it be made of record. As I understand this, if such disclaimer is not by deed, it must appear of record in the suit, in which such freehold in the land is claimed. How it must be made to appear of record is not decided, nor is it intimated in the case in 1 Rob. But to me it seems clear, that if all the defendants disclaim, it is unimportant, whether such disclaimer is made to appear of record by a formal plea of disclaimer or by a simple entry on the record-book, that the defendants disclaim any interest in or claim to the land in controversy. The reasoning of the court in *Bryan* v. *Hyre* to show that a parol disclaimer would be insufficient is as well met by such a disclaimer entered on the record-book as a part of the proceedings in the case, as it would be by a formal plea of disclaimer filed by the defendants. And if some of the defendants disclaim as in this case, the proper mode of so doing would be by a simple entry of record of their disclaimer, as was done in this case, and not by a plea of disclaimer by a part only of the defendants. If the plea of not guilty has been put in as in this case, the court ought to permit all the defendants to withdraw it and put in a plea of disclaimer or abandon their defence by a simple entry of disclaimer by all the defendants of record. But if all the defendants do not choose to withdraw their plea of not guilty and to disclaim, a part of them ought not to be allowed to do so, as a simple entry of disclaimer by them on the record-book will stop all costs against them after the entry of such disclaimer, which is all that they are in such case entitled to; and as full justice is done them by such simple entry of disclaimer on their part on the record-book, there is no reason why the court should permit the withdrawal of the plea of not guilty, which has to be tried, as some of the defendants rely npon it and decline to withdraw it.

There was therefore no error in the manner in which James H. Camp and Martin P. Camp disclaimed any interest in the land in the controversy in this case. By their simple entry on the record-book, that "they appeared in court and disclaimed any interest in the land in controversy in this case," they abandoned the defence their ancestor had made, and thereafter they ought not to be rendered liable for costs subsequently accrued in the case by the controversy being con-

tinued by their co-defendants. But as their ancestor had carried on the controversy for nearly thirty years before this disclaimer, they, in case the demandants recovered, ought to be liable for the costs incurred during these thirty years of controversy; just as James M. Camp the original tenant would have been, had he lived to the time this disclaimer was made and had then appeared and withdrawn his defence by a plea of disclaimer. It may be, that James M. Camp and Martin P. Camp might have by a proper course escaped the payment of any costs in this case by appearing to the *scire facias* to revive the case against them and asking the court not to revive the case against them or make them defendants in the case. This request I suppose would have been granted only upon their executing to their co-heirs, who proposed to continue the controversy, a release or conveyance in fee not simply of their interest in this tract of land in controversy but of all their interest in the estate of their ancestor. For such a release would put them in the same position, as if they never had been heirs, and would thus, it seems to me, show cause why the case should not be proceeded with against them as defendants, and would be as good an answer to the *scire facias* as the showing that they never were heirs would have been.

For these reasons, I am of opinion, that the circuit court of Lewis county erred in its judgment entered on March 8, 1877, in that portion of its judgment only which is in the following words: "And also that the said demandants recover against the said defendants their damages assessed as aforesaid, and their costs in this behalf expended;" and that in lieu thereof the circuit court should have inserted the following words in its judgment: "And also that the said demandants recover against the defendants their damages aforesaid and their costs in this behalf expended prior to March 1, 1875; and that the said demandants further recover against all the defendants other than James H. Camp and Martin P. Camp their costs in this behalf expended since March 1, 1875." There is no other error in said judgment, as it was properly rendered against all the defendants, and a writ to cause them to have seizin of said land was properly granted against all the defendants. The error we have pointed out in said

judgment is not one for which it can be reversed, as it is error only to a small part of the costs in the case. This Court can not reverse a judgment or decree for error in the awarding of costs only; but in such case it will correct the judgment or decree in this respect and then affirm it.

The judgment of the court below must therefore be corrected in this respect and must then be affirmed; and the defendants in error must recover of the plaintiffs in error their costs in this Court expended and $30.00 damages.

CORRECTED AND AFFIRMED.

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CHARLESTOWN.

POOLE v. DILWORTH *et al.*

Submitted June 13, 1885.—Decided September 26, 1885.

1. Under ch. 8 of Acts of 1881 the pleadings in a civil action before a justice may be oral or in writing, and if oral, there should be entered on the justice's docket a brief statement of the contents of such pleadings (§50 and §179); and if an appeal is taken, new or amended pleadings in writing may, if substantial justice requires it, be filed in the circuit court, or the case may be tried on the pleadings before the justice or, when oral, on the brief note of their contents on the justice's docket. But whether written pleadings be filed before the justice or in the circuit court, they need not be of any particular form but must be such as to enable a person of common understanding to know what was intended. (p. 585.)

2. Either party plaintiff or defendant is estopped from alleging in a suit at common law or in chancery anything inconsistent with any point, which has been before adjudicated by a court of either common law or chancery of competent jurisdiction; and the conclusiveness of any judgment or decree extends beyond what may appear on the face of the judgment or deeree to every point, which was at issue and determined in the course of the proceedings. (p. 586.)

3. A decision upon a demurrer, though it be but a decree dismissing the plaintiff's bill, will be conclusive of every matter whether specially stated in the bill or or not, provided it is clear, that such matter was necessarily in controversy in the suit and was decided in it, otherwise such decree will not be conclusive of such matter. (p. 593.)

GREEN, JUDGE, furnishes the following statement of the case :

In April, 1882, Patrick F. Poole warranted John Dilworth and John J. Dilworth before a justice of Taylor county on a bond for $250.00, dated May 14, 1873, payable to Eliza A. M. Litzinger and James Rogers on October 1, 1874, with interest from its date, which bond to the extent of the interest of Mrs. Eliza A. M. Litzinger in it was assigned to James Rogers for a valuable consideration on May 26, 1873, and on June 3, 1873, was assigned for a valuable consideration to the plaintiff, Patrick F. Poole. These assignments were made by endorsements on this bond. It is not claimed that any portion of the bond was ever paid to any one, the whole of it still being unpaid. The summons was returned, served on John Dilworth and John J. Dilworth was not found. On June 3, 1882, the justice rendered a judgment against John Dilworth for $365.00 and $295.00 costs. John Dilworth failing to obtain an appeal in the time allowed by law on petition (sworn to) showing good cause, why he had not obtained such an appeal was awarded an appeal by an order of the circuit court of Taylor made on August 2, 1882. The order granting this appeal states, that the petition for it was accompanied by the appeal-bond signed by him with Adolphus Armstrong as his security in the penalty of $750.00 conditioned according to law.

The defendant, Dilworth, filed a plea in writing to the effect that the plaintiff, Poole, instituted in the circuit court of Taylor county his certain suit in chancery against the defendants, John Dilworth, James Rogers, John J. Dilworth, Eliza A. M. Litzinger, Thomas B. Bartlett and Dennis A. Litzinger for the purpose of enforcing against the defendants John Dilworth and John J. Dilworth the single bill warranted upon, assigned as above stated, to which said defendants, John Dilworth and John J. Dilworth, demurred; that on November 15, 1881, the said court heard said cause on its merits and sustained said demurrer and dismissed said suit with costs; that the cause of action in this appeal-case is the same cause of action decided in said chancery-suit; whereupon the defendant John Dilworth prays judgment if the plaintiff ought to be permitted contrary to said decree in said chancery suit to maintain this action against him.

To this plea the plaintiff, Poole, replied generally, and issue was joined upon it; and the parties waiving the right to have a jury, the court on March 27, 1884, proceeded to hear and determine the whole matter of law and fact and to give judgment accordingly. Thereupon the plaintiff to maintain his action gave in evidence his bonds above described and the assignments aforesaid, the transcript of the proceedings before the justice and the appeal-bond given by John Dilworth and Adolphus Armstrong; and the defendant gave in evidence the record of the proceedings had in said circuit court on the chancery-rule in the cause of *Dennis A. Litzinger and Eliza A. M. Litzinger his wife* v. *John Dilworth, John J. Dilworth and James Rogers;* and in the cause of *J. W. Mason, Commissioner, &c.*, v. *Thomas Bartlett, &c.*, and also the petition or more properly bill of Patrick F. Poole against John Dilworth and others named in said plea. This being all the evidence, the court rendered judgment in favor of the plaintiff, Patrick F. Poole, against the defendant, John Dilworth, and his surety, Adolphus Armstrong, for the sum of $390.00 with interest at the rate of ten *per cent. per annum* from August 2, 1882, until paid, and the costs of this appeal, to which action of the court in rendering said judgment the defendants, John Dilworth and Adolphus Armstrong, excepted, and the court signed a bill of exceptions, in which all of said evidence at said trial was set out at length. The substance of these chancery causes and a statement of the proceedings in them, so far as they bear upon this case, will be given in the opinion.

From this judgment of the circuit court a writ of error and *supersedeas* was awarded by a judge of this Court on the petition of John Dilworth and Adolphus Armstrong.

Martin & Woods for plaintiff in error.

James Morrow, Jr., for defendant in error.

GREEN, JUDGE:

The first error assigned by the plaintiffs in error is, that the case was in no condition for trial, when it was tried by the circuit court, as no issue had been properly made up. Sec. 50, ch. 8 of the Acts of 1881 provides, that in justices'

courts the pleadings may be oral or in writing; if oral, the substance of them shall be entered by the justice in the docket; and it further provides, that "such pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what was intended." Section 169 of the same chapter provides, that when an appeal from the judgment of a justice has been taken, "the appeal may be tried upon the pleadings made up in the justice's court or the pleadings may be amended before or during the trial of the appeal, when substantial justice will be promoted by the amendment."

In this case the justice failed to enter on his docket the substance of the pleadings of the parties, as he should have done. The entry on his docket was simply: "Pleadings made up and filed." But no pleadings in writing appear to have been in fact filed, so that it was very proper in this cause for the circuit court to permit the defendant to put in his plea in defence in the circuit court. It is obvious, that these pleadings in the circuit court, when it allows them to be filed, need not be in any particular form but need simply be such as to enable a person of common understanding to know what was intended; for when the pleadings are in writing before the justice, this is all that is required; and upon pleadings in this form filed before the justice the case is usually tried in the circuit court; and if amended pleas can be filed in the circuit court, it would seem clearly, that they need not be any more formal than those filed before the justice.

This being the case, we need not look critically into the plea filed by the defendant in the circuit court. It was in substance, that the matters in controversy had already been adjudicated and decided against the plaintiff in a certain chancery-suit specified. This plea was certainly sufficient to enable a person of common understanding to know, what was intended to be relied upon as a defence by the defendant; and this is all that was necessary. So the statement in the record, that to this "plea the plaintiff replied generally," is sufficient. This replication was certainly sufficient to enable a person of common understanding to know, what was intended, that is, that the plaintiff denied, that this

cause of action in this appeal had been adjudicated and decided against him in the decree in the chancery-suit, upon which the defendant relied as a bar to this suit. It is a usual thing in this State to simply enter on the record-book, that the plaintiff replies generally to a special plea, when it is the purpose of the plaintiff simply to traverse each plea; and it is unusual to file such general replication in writing even in a regular action instituted in the circuit court, where the pleadings are formal and in writing; and such an entry on the record-book is sufficient in such case, if it is done instead of writing out a formal replication, and the case is tried and verdict and judgment rendered, as though such formal replication was filed. (*Sweeney* v. *Baker et al.*, 13 W. Va. 216.) And even in suits instituted in the circuit court, if the record shows by an entry on the record-book, that a general replication is filed to a special plea, and issue is joined thereon, though no written replication appears in the record, this would be no error, for which an appellate court would reverse a judgment. (*Sweeney* v. *Baker*, 13 W. Va. 160, point 15 of syllabus.) Of course this Court will not reverse the judgment in this case, because there was no proper issue joined, as under our statute-law the issue was joined with all the formality necessary, and, even if objection to this mode of joining issue had been made in the circuit court, it could in an appeal-case from a justice properly have disregarded such objection.

The second and third errors assigned by the plaintiff in error were, that the court erred in allowing the bond of $250.00, sued on, to be read on the appeal in evidence without proving its execution. These objections to the action of the court below, made for the first time in this Court, are obviously untenable, if for no other reason for the obvious reason that this bond was permitted to be read in evidence without proof of its execution in the court below without any objection, and objection to its being read and regarded as evidence can not be made in this Court for the first time upon principles so well settled, that it is unnecessary to refer to authorities. But in truth proof of the execution of the bond sued upon in this case could not have been demanded by the defendant in the court below, because its execution as

well as its regular transfer and ownership by the plaintiff below was expressly admitted by the plea filed by the defendant, and the issue which the court below was trying did not therefore require on the part of the plaintiff any proof of the execution of this bond or indeed even the production of the bond in evidence. The only real question in issue in the circuit court, and really, as I understand the record, the only question in controversy between the parties is: Was the decree in the chancery cause named in the defendant's plea in the circuit court an adjudication, that the plaintiff below was not entitled to a personal judgment on the bond, on which he has warranted the obligors in it, John Dilworth and John J. Dilworth, as was claimed by the defendant?

To determine this question it is necessary to examine the bill or petition, as it is improperly called, in that cause, the demurrer thereto and the decree thereon rendered by the chancery-court; but it is not necessary to consider the answer now put in by John Dilworth and John J. Dilworth, as this answer was not considered or acted upon by the chancery-court. This bill was as follows:

"*To the Hon. A. B. Fleming, judge of the circuit court of Taylor county, West Virginia:*

"The petition of Patrick F. Poole, plaintiff, against John Dilworth, John J. Dilworth, James Rogers, Eliza A. M. Litzinger, Thomas H. Bartlett, Dennis A. Litzinger, defendants, filed in the circuit court of Taylor county:

"Said plaintiff complains and says that on May —, 1873, the defendants Eliza A. M. Litzinger, who is the wife of defendant Dennis A. Litzinger, and the defendant James Rogers sold certain mill property situate in the county of Taylor aforesaid, near the town of Flemington, to the defendants John Dilworth and John J. Dilworth for the sum of $2,000.00 the sum of $815.59, part purchase-money, was in hand paid, and for the residue the said Dilworths executed their three several notes as follows: One note for $684.41, date May 14, 1873, due and payable October 1, 1873, with interest; also one note for $250.00 bearing same date, due and payable October 1, 1874, with interest, and one note for $250.00, same date, due and payable October 1, 1875. Plaintiff says that the said note for $250.00, due and payable on October 1,

1874, with interest, was by the defendant Eliza A. M. Litzinger, for a full and valuable consideration, assigned and transferred by her to the defendant James Rogers; that the defendant James Rogers, for a full and valuable consideration, assigned and transferred the said note to the plaintiff, who still owns and controls the same, which said transfers and assignments the defendants John and John J. Dilworth had due notice. The said note is filed herewith as Exhibit "A" as part of this bill and is a lien on said mill property sold and conveyed by said Eliza A. M. Litzinger and James Rogers to defendants Dilworths; that the said $250.00 note so assigned plaintiff is wholly unpaid.

"Plaintiff further says that on the — day of January, 1874 defendants Dennis A. Litzinger and Eliza A. M. Litzinger filed their bills in chancery in said circuit court of Taylor county against the defendants John Dilworth, John J. Dilworth and James Rogers to enforce their vendor's lien on said property against said Dilworths, the said Litzingers then holding and owning the $684.41 note and the last $250.00 note due October 1, 1875. Their deed was duly filed in the said cause conveying the property to said Dilworths. And further, that by a decree rendered in that cause the said mill property was sold by John W. Mason, commissioner, appointed to make the said sale, and purchased by defendant Thomas H. Bartlett, the said John Dilworth and John J. Dilworth signing his notes to commissioner Mason as sureties, the amount of purchase-money being $1,475.00; all of which will appear by reference to the said chancery cause, which said chancery cause is now here referred to and asked to be read and taken, together with all the papers, exhibits and orders therein made, as a part of this cause.

"Plaintiff further says that said Thomas H. Bartlett, defendant, has not paid to this day any of the said purchase-money ($1,475.00) to the said commissioner, and that afterwards, to-wit, on the — day of January, 1876, the said John W. Mason, commissioner, instituted in the circuit court of Taylor county his suit in chancery against the said Thomas H. Bartlett and John Dilworth and John J. Dilworth and at the —— term of said court recovered a decree of sale

and again sold the said mill property to defendant John Dilworth for the sum of $450.00, executing his three notes of $150.00 each, with Adolphus Armstrong his surety; all of which will appear by reference to the said chancery cause of John W. Mason, plaintifi, against the defendants, Thomas H. Bartlett, John Dilworth and John J. Dilworth, which said cause is referred to and asked to be read as a part of this cause.

"Plaintiff further says that the said two chancery causes present strange proceedings and remarkable conduct on the part of the defendants, Bartlett and Dilworths. The property originally purchased by the Dilworths for $2,000.00 being sold one and a half years later to defendant Bartlett for $1,475.00 and sold one and a half years later than that to defendant John Dilworth, the original purchaser, for $450.00, no decree taken in first named chancery cause for deficiency between the sum of $2,000.00 and interest, original purchase-money, and the sum of $1,475.00 purchase by Thomas H. Bartlett, and when Bartlett failed, as did also the defendants, John and John J. Dilworth, his sureties, to pay to commissioner Mason his said notes, the property was again sold to John Dilworth for $450.00 and no decree taken over against Thomas H. Bartlett for the difference between $1,475.00 and interest and the sum of $450.00, Dilworth's last purchase, notwithstanding the papers and proceedings in the said chancery causes showed that plaintiff owned and held the note of $250.00 of said Dilworth's to Rogers and Eliza A. M. Litzinger which was and is a lien and second in priority and is wholly unpaid.

"Plaintiff further says, that he filed a petition in said last named chancery cause, setting up his claim and rights, as will fully appear, yet the same was wholly ignored and disregarded; plaintiff therefore prays that his rights may be fully protected and the lien retained to secure his note be enforced, either against the property or against the purchaser, Thomas H. Bartlett, and his sureties, who have failed to pay the purchase-money; and such other further and general relief as the court may see fit to grant, &c."

The demurrer is as follows:

"The defendant John J. Dilworth demurs to plaintiff's

petition, and for cause of demurrer says that it appears by the petition and its exhibits that the said mill property that petitioner now seeks to sell to pay the vendor's lien for the $250.00 note, has been sold to pay the lien and the sale confirmed by the decree of this Court in the Litzinger suit, and that the property sold for enough to pay the lien, and that enough of the sale-money to pay the note is now in the hands of John W. Mason, the commissionsr of the sale, and is now in and under the control of this Court; therefore the demurrant says that it appears by the petition that he has paid said $250.00 note and its interest, and that therefore the petition should be dismissed, with costs to him against petitioner.

"And for other and further cause of demurrer, demurrant says, that it appears by the petition that said $250,00 note and petitioner's present claim for its payment were set up and presented to this Court by petitioner in his petition filed in the chancery suit of John W. Mason, commissioner, against Thomas H. Bartlett and these demurrants, and that this Court in that suit 'ignored' and refused petitioner,s claim and refused to decree payment of the note; and demurrant says that it does not appear by the petition that the 'ignore' refusal or decree has been reversed; wherefore demurrant says that the petition should be dismissed with costs to him against petitioner. If it was error in the decree confirming the sale in the Barlett suit to 'ignore' the petition for payment of the note and to refuse and to decree against the payment, petitioner can not by his new or present petition reverse or correct the decree, nor could do so by notice or motion. It is not, so far as it relates to petitioner, a decree on a bill taken for confessed, but it is, on his petition, filed and received as his answer to the bill and on replication to the answer, nor if error, is the error such as that after hearing on answer and replication, the decree could be amended on notice and motion. The decree, if error, can only be reversed and corrected on appeal and at the cost of petitioner or at the cost of plaintiff Mason."

The final decree in said cause was as follows:

"And at a term of said court held as aforesaid on the 15th day of November, 1881, came as well the petitioner, Patrick F. Poole, by his counsel, as the defendants, John Dilworth

and John J. Dilworth, by their counsel, and this cause came on this day to be further heard on the peiition of said Poole, joint answer of said John and John J. Dilworth to the petition, replication thereto, and the demurrer of said Dilworths to the petition, and joinders in the demurrer, and on the papers and orders and proceedings in the two chancery causes, the one of Dennis A. Litzinger and Eliza A. M. Litzinger against said Dilworths and James Rogers, and the other of John W. Mason, commissioner, against Thomas H. Bartlett and Dilworths, and was argued by counsel. On consideration whereof, the court is of opinion and doth consider that the petition of petitioner Poole is not sufficient, and that the demurrer to the petition be sustained and the petition dismissed, and that the defendants John Dilworth and John J. Dilworth recover against the petitioner Poole their costs by them about their defense of said petition expended."

All that the court decided by this decree, it appears to me, was that the lien retained to pay the bond of John Dilworth and John J. Dilworth held by the plaintiff, the one sued on in the case now before us, was not a lien upon the tract of land in this bill or petition named and could not be enforced out of it, nor could it be enforced in this suit by ordering its payment out of the moneys due from the purchaser of said land, Thomas H. Bartlett, and his securities for the payment of such purchase-money. The prayer of the plaintiff's bill or petition clearly shows, that the sole object of the bill or petition was to obtain a decree of this character and not a personal decree. If the plaintiff, Patrick F. Poole, was not entitled to such a decree, he was clearly not entitled to a personal decree against John Dilworth and John J. Dilworth on the bond, which he held against them, because his proper mode of enforcing it against them, if he had lost his lien on said land, was by a suit at law; and he accordingly by his bill or petition sought no personal decree against them for the amount of his land, but the court having held, he had no such lien, as a matter of course dismissed the bill or petition at his costs, but by so doing neither decided nor intimated an opinion, that they, the Dilworths, were not liable personally for the amount of said land to the plaintiff Poole. This was obviously what the court understood by its decree; for it

afterwards permitted the plaintiff, Poole, to withdraw his bond, which he had filed with his bill, in order that he might sue on it at law and recover a judgment on it against John Dilworth and John J. Dilworth.

Though a decesion upon a demurrer be as in this case but a simple dismissal of the bill, it will be conclusive of every matter whether specifically stated in the bill or not, provided it is clear, that such matter was necessarily in controversy in the suit and was decided by it. Yet, if as in this case it be not clear, that such matter was not necessarily in controversy in the suit, and if it be not clear, that it was decided in such suit such decision will not be conclusive of such matter.

The case of *Corrothers et al.* v. *Sargent et al.*, 20 W. Va. 356–7, is relied upon by the plaintiff below as showing that this decision is an estoppel to any recovery by the plaintiff below in the case before us. What was held by this Court in that cause to use the language of Judge Snyder in delivering the opinion was: "It is well settled, that a point once adjudicated by a court of competent jurisdiction, however erroneous that adjudication, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law or in chancery, when either party, or the privies of either party, allege anything inconsistent with it; and this too when the subsequent suit is upon the same or a different cause of action; nor is it necessary that precisely the same parties were plaintiffs or defendants in the two suits; provided the same subject-matter in controversy, between two or more of the parties, plaintiffs or defendants, to the two suits respectively, has been in the former suit directly in issue and decided. The conclusiveness of the judgment or decree extends, beyond what may appear on its face, to every allegation which has been made on the one side and denied on the other, and was at issue and determined in the course of the proceedings. A decision on a demurrer, which has clearly gone to the merits of the case, is an effectual bar to further litigation. All the authorities agree, that if it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon a demurrer or the facts in issue, it can not be again considered in any subsequent suit. Big. Estop. 22 and 45; *W. M. & M. Co.* v. *Virginia*

Cannel Coal Co., 10 W. Va. 250; *Coville* v. *Gilman*, 13 W. Va. 314; *Beckwith* v. *Thompson*, 18 W. Va. 103; *Griffin* v. *Seymour*, 15 Iowa 30."

The difficulty in regarding the chancery-decree above set out as an estoppel in the case before us is, that the plaintiff below does not "allege anything inconsistent with this decree." The trouble is, that the question, whether John Dilworth and John J. Dilworth were personally liable on the bond held by the plaintiff and described in the bill, the bond sued on in the case before us, to the plaintiff Poole, was not at issue and was not determined in the course of the proceedings in the chancery cause. It does not appear by the chancery-record, that the point in controversy in the case now before us was necessarily decided in this chancery-cause upon the demurrer. On the contrary it seems to me clear, that this point now in controversy was not decided in the chancery cause upon the demurrer. And it is still more clear, that it was not decided or considered in either of the other two chancery-causes referred to in the bill above copied, and the proceedings in these two chancery-causes are correctly stated in the bill. These three chancery-causes are the causes, the records of which were introduced in evidence on the trial of the case now before us in the circuit court. It is of course unnecessary to state the contents of the joint answers of John Dilworth and John J. Dilworth in this last chancery cause, as it was decided only on the demurrer. But I will say that this answer does not deny the specific allegation in Poole's bill, that no part of the bond sued on in this cause had ever been paid.

For these reasons I am of opinion that the judgment of the circuit court in this case must be affirmed; that the plaintiffs in error must pay to the defendant in error, Patrick F. Poole, his costs in this Court expended and damages according to law.

AFFIRMED.

CHARLESTOWN.

HARRIS *v.* HAUSER, *et al.*

Submitted June 17, 1885.—Decided September 26, 1885.

28 595
146 742
46 743
28 595
77 91
28 595
48 37
48 308
28 595
58 567

B. is in the possession of lumber cut from A's land. B. sawed this lumber and bestowed other labor on it and under contract between them he claims a right to hold possession of this timber and sell it and out of the proceeds retain what is due him for his labor bestowed thereon. A. claims that B. has no right to ship this lumber in his own name but only in A's name; and that for what he may owe B. on account of his sawing of this lumber and other labor bestowed thereon B. has no remedy except by a common law suit, having under their contract no lien upon the lumber. A. brings a chancery suit against B. enjoining him from collecting certain moneys for a portion of this lumber shipped by B. in his own name and sold by him, as A. claims, improperly and to prohibit him from selling any more. The court at the instance of B. orders a receiver of the court to take possession of the lumber then in B's possession and unsold and sell the same and bring the money into court, at the same time ordering a settlement of the accounts between the parties, but settling none of the principles of the cause. HELD:

This is not such an order, as A. can appeal from and thus get a decision on the merits of the cause, before it has been adjudicated in the court below, as such order is, so far as A. is concerned, not an order changing the possession of property. (p. 600.)

GREEN, JUDGE, furnishes the following statement of the case:

Thomas A. Harris owned a tract of land in Ritchie county on the Parkersburg branch of the Baltimore & Ohio Railroad and on September 7, 1882, he entered into the following contract with J. M. Hauser in reference to timber on said land: "This contract, made on September 7, 1882, between Thomas A. Harris, of the city of Parkersburg, county of Wood, and State of West Virginia of the first part, and J. M. Hauser, of Thornton, Taylor county, and State aforesaid, of the second part, witnesseth:

"That in consideration of the payments hereinafter specified to be made by the said party of the first part to the said party of the second part, the said Hauser hereby covenants

and agrees to and with the said Harris that he, the said Hauser, will furnish saw-mill and attachments on the land of the said Harris, near Silver Run Tunnel, on the line of the Parkersburg Branch Railroad, will superintend the logging of all timber cut on said land by said Harris under contracts said Harris has therefor with others, and that said logging and cutting is done for said Harris under said contract to the best advantage and interest of the said Harris, and at the lowest and cheapest rate; shall saw all timber on said land at his own expense to the best advantage; shall paint the ends of all pieces that become necessary, and deliver the said lumber so sawed by him free on board the cars at Silver Run Tunnel, on the line of said railroad; that he will take charge of and superintend the laying of a tram-road from the place where the mill may be located to the above named point of shipment on said railroad, and shall without charge saw all lumber necessary or required to make said tram-road; that said Harris shall have the benefit of all contracts for sale and delivery of lumber now made by said Hauser with any person or corporation, and hereby transfers, assigns and sets over the right of said contracts to said Harris, the said Hauser to receive and be paid for sawing said lumber, except said tram-road lumber, and delivering at said railroad, the sum of $6.00 per thousand feet, and in addition thereto for superintending as aforesaid and giving a general management and superintendence to said timber before and after the same is cut, logged, sawed and delivered as aforesaid and sold and consigned, the sum of $50.00 per month, the payment of which sum shall be made only on the receipt of money for lumber sold and not otherwise, and shall not be demanded or required except from money derived from sales of lumber. And said Harris hereby covenants and agrees with said Hauser that he, the said Harris, will make the payments for sawing and delivering lumber and superintendence as aforesaid in the manner and form aforesaid; that said Hauser shall have the right to leave his said saw mill on said land after said Harris' timber is sawed and delivered as aforesaid, and run the same in sawing timber for other persons if he so desires, without any rent or charge, and to remove the same at such time after said Harris' timber is sawed as he may

choose, and shall have the use of said tram-road as may be necessary in executing contracts with other persons than said Harris.

" Witness the following signatures and seals.

"(Signed) T. A. HARRIS. [SEAL.]
" " J. M. HAUSER. [SEAL.]"

Under this contract Hauser went upon the land and superintended the logging of the timber cut thereon by Harris and saw to the cutting thereof to the best advantage and sawed it with a saw-mill on the premises furnished by Hauser but owned by his wife. A part of this timber was shipped in his own name to various parties at different times, among whom was Bew, Spencer & Co., of Baltimore City, Maryland. This was done in Hauser's name against the protest of Harris, who claimed, that under this contract it was his timber and ought to be shipped in his name and not in the name of Hauser. The amount so shipped to this Baltimore firm netted when sold $523.92, which sum Harris notified Bew, Spencer & Co. not to pay to Hauser and also notified Hauser not to collect the same. The construction placed on this contract by Hauser was that he remained the sole owner of this lumber, and Harris's control over it ceased and determined, when he delivered it on board the cars at Silver Run Tunnel, and that Hauser had no right to ship it or any part of it in his own name, as none of it belonged to him; that he had no right to sell it or to receive any money arising from its sale. But though notified of this Bew, Spencer & Co. refused to pay to Harris this $523.92, and Hauser refused to direct it to be paid to Harris. On the contrary Harris claimed, that under this contract he had a right to receive this money himself, and he urged the Baltimore firm to pay it to him.

This being the state of the case, on January 27, 1885, a bill was presented to the circuit court of Ritchie county by Thomas A. Harris against J. M. Hauser and Bew, Spencer & Co. setting out the above facts and stating, that when this contract was made he was led to believe, that Hauser owned this saw-mill and was a man of means, which was untrue, this saw-mill being owned by his wife and Hauser having no means of large amount and being virtually insolvent. The bill prayed an injunction enjoining him among other things

from collecting said money and asking that Bew, Spencer & Co. may be directed to pay this money to him, and that Hauser be enjoined from selling more lumber in his own name, and asking for general relief. The bill was sworn to, and the injunction prayed for was granted.

On October 19, 1883, the court entered a decree reciting that Hauser in open court admitted that Bew, Spencer & Co. had in their hands $552.92 the net proceeds of the lumber; and that Hauser agreed, that it might be paid into court to the clerk, as there was no general receiver; and thereupon the court ordered that this should be done and the money should be loaned out by the clerk as a special receiver on good personal security till the next term of the court, when he should have it in hand subject to the order of the court.

Hauser filed an answer, which was excepted to and the exception overruled. None of the allegations of the bill were denied in the answer, except Hauser said, that he was not virtually insolvent but on the contrary, if the plaintiff would pay him, what he owed him under this contract, he could pay all his debts; and he claims this debt due him was at least $2,500.00, and files with his answer long statements to show how the accounts between him and the plaintiff stood. The answer then concludes as follows:

"Defendant, as new matter, charges, that since the service of the injunction upon him, at the special instance and request of the said Harris, the defendant has shipped in the neigborhood of 100,000 feet of lumber in the said Harris' name, and by his orders, in the name John Wait, and the said Harris, or Harris and Wait, have received all the proceeds of the sales thereof, and neither of them has rendered to the defendant any account thereof. And as additional new matter, the defendant says that he has been informed and believes, and on said information and belief, charges that the said Harris is wholly insolvent; and as far as advised, this defendant will lose his entire claim unless he is permitted to retain the same out of the proceeds of the sales of the lumber now on hand and ready for shipment.

"Your respondent therefore prays that said Harris be required to answer the new matters herein contained fully upon oath, and that he be restrained by order of this court from

making sale or disposing of said lumber. And to the end that justice and equity may be done in the premises, defendant prays that this cause may be referred to a commissioner to make, take and state an account of all matters between plaintiff and defendant growing out of said contract, showing what is due to this defendant upon a full settlement of all such matters.

"The further prayer of defendant is that a receiver be appointed by this court to take charge of all lumber undisposed of, to make sale of the same, and return the proceeds thereof here into court. And the defendant prays for such other, further and general relief as to fairness and equity appertains. And as in duty bound, &c., &c."

This answer was sworn to.

The three last exceptions to this answer are stated below as showing the nature of the controversy in the court below:

"Seventh.—That a court of equity has no jurisdiction to take cognizance of and settle such accounts as are in said answer mentioned and to take away the right of trial by jury.

"Eighth.—That there is no jurisdiction in a court of equity to deprive the plaintiff of his absolute property in and dominion over the said 175,000 feet of lumber in order that a pretended creditor, without having attached or availed himself of his legal remedies, may secure his debt and none of the relations existing entitling him to such relief.

"Ninth.—That this is not a case in which a receiver can or should be appointed to take charge of property; there is no notice or jurisdiction to appoint one, and a mere *exparte* affidavit of injury to property not belonging in any way or manner to the applicant to have a receiver appointed is not sufficient to found such application."

A special replication was offered to the new matter above stated contained in this answer, and the court refused to permit such special replication to be filed. An affidavit was made by Hauser, the substance of which was stated in the order of March 7, 1884, which was as follows:

"The complainant this day tendered his general replication to the defendant's answer, which is ordered to be filed, and the complainant also tendered his special replication to

said answer, which is excepted to, and the exception being considered by the court is sustained, and the said special replication is disallowed. And this cause came on further to be heard upon the papers formerly read herein, and it appearing that no proper or final decree can be rendered in this cause at this time, and that it is necessary to a correct determination of the matters involved in this cause that an account should be taken and stated between the parties, it is ordered that this cause be referred to J. W. Dunnington, Esq., one of the commissioners of this court, to take, state and audit the accounts between the parties, Harris and Hauser, and make report thereof at the next term of this court; and it further appearing to the court by affidavit filed in the papers of this cause that the timber mentioned at and near Silver Run Tunnel in Ritchie county, and mentioned in the proceeding, is, for want of attention, fast deteriorating in value, is liable to further injury, loss and destruction, on motion of the defendant it is ordered that W. B. Hawkins be and he is hereby appointed a special receiver to take possession of said lumber and make sale thereof to the best advantage and for the best prices he can, and make report of his action hereunder to the next term of this court, and bring the proceeds arising from such sales into court; but before acting under this appointment, said special receiver is required to enter into bond in the penalty of $1,000.00 conditioned according to law."

Depositions were taken in reference to the state of these accounts between the plaintiff and defendant, but they were in no way acted upon by the court.

The plaintiff obtained an appeal and *supersedeas* to the various orders made by the circuit court in this cause above referred to.

Van Winkle & Ambler for appellant.

G. Loomis for appellee.

GREEN, JUDGE:

The statement of this case shows the character of the controversy involved in the cause; and it also shows, that the court below has entered no final decree in the cause, nor

adjudicated any one principle involved in the cause, nor dissolved nor refused to dissolve the injunction, which has been awarded, nor entered any decree requiring money to be paid or real estate to be sold. There can therefore be no pretence for this Court to take jurisdiction to review any action, which the court below has taken, as none of these actions of the court below can possibly constitute a ground for an appeal under ch. 157 sec. 1 of Acts of 1882, unless the last decree of the court could be regarded as "requiring the possession or title of the property to be changed" which is one of the grounds named in the seventh subdivision of said section as constituting a ground for an appeal. I am by no means satisfied, that the statute by the words "the possession or title of the property to be changed" does not mean the title or possession of real estate to be changed; for just before using these words it had spoken of *real* estate to be sold. But if for the sake of argument I admit that this phrase in the statute means "the possession or title of property real or personal to be changed," it would still seem to me clear, that in this case this Court could not take jurisdiction under the statute. The property spoken of in this order is the lumber named in the affidavit. Now there is no question, but that this lumber was legally in the possession of Hauser, when the order was made. There is a dispute as to the time, when Hauser's possession and control of the lumber under the contract between the parties ceased. But it is clear on the face of the contract and is not and could not be disputed by the plaintiff, that Hauser's possession and control did not cease, till the said lumber was placed upon the cars at Silver Run Tunnel, though the title to said lumber is claimed by the plaintiff to have been in him at all times both prior to and after its being thus placed on the cars. This is the language of the bill on that subject:

"Your orater avers and charges that he, your orator, was the sole owner of said lumber sawed under said contract, that said Hauser's duties and control over said lumber ceased and determined when he delivered and placed said lumber free on board the cars at said Silver Run Tunnel."

As this lumber had not been thus placed upon the cars, when this last order was made directing W. B. Hawkins as receiver to

take possession of it and make sale thereof, it is obvious, that Hauser was in the possession of it; and he not only consented to but asked this order to be made. Of course he could not complain of it. Harris the plaintiff can not appeal from it, because this order does not change his possession of this property he having never had any possession of it. It matters not then how liberal our construction of this section of the act conferring the right of appeal to this Court may be, it can not confer the right on the plaintiff, Harris, who was not deprived of the possession of any property by this or by any other order of the court below.

The truth is obvious, that the plaintiff, Harris, insisted, that under the proper construction of the contract of September 7, 1882, and the admitted facts he was entitled to an order or decree directing the $523.92, which was or had been in the hands of Bew, Spencer & Co., to be paid over to him without any ascertainment of the balance which might be due to Hauser for his services. The court without determining, whether he had this right or not, and without settling the principles of the cause thought proper to refer the cause to a commissioner to take and settle an account between the parties. It may well be, that this commissioner's report may show, that the plaintiff is entitled to the whole of this $523.92, as would be the case beyond controversy, if it turned out, that he was not indebted to the defendant Hauser, and for anything I say now, it may be he is entitled to it in any event, as he claims. But until the court below has decided this point and adjudged the principles of the cause, this Court is clearly not entitled to take jurisdiction. And it is not for us in this stage of the cause to say, whether the court below erred in overruling the exceptions to the special replication or in appointing a receiver. Though all these orders were such as ought not to have been made, as claimed by appellant's counsel, they could not in the present state of the case be by us reviewed or altered.

We are an Appellate Court, whose business it is to review the decrees of the circuit courts, when the cause is substantially ended in those courts. It was never designed or intended, that this Court should take supervision of the circuit courts during the progress of the causes, and, if they

failed to adjudge the principles of the cause, when one of the parties to the suit thought, that such principles might and ought to be adjudicated, or if they made mistakes during the progress of the causes, interpose and correct such errors and adjudicate the principles of the canse, before the court below had decided them. This would not be appellate jurisdiction; and if such duties were by law imposed upon this Court, it would be simply impossible to perform them. It is as much as can be done by this Court, to decide all the causes in this State, in which the courts below may have erred in their final judgment or decree or in adjudicating the principles of the cause. We could not possibly supervise all these courts during the progress of the suits before them; for in so doing it would doubtless often happen, that fully a dozen appeals would be taken at different times in the same cause.

I am therefore of opinion, that the appeal and *supersedeas* were improvidently awarded, and that the appeal must be dismissed, and the appellee, J. M. Hauser, recover of the appellant, Thomas A. Harris, his costs in this Court expended

DISMISSED.

CHARLESTOWN

CRESAP v. KEMBLE.

AND

KEMBLE v. CRESAP *et al.*

Submitted June 12, 1885.—Decided September 26, 1885.

1. If the court has no jurisdiction, it will dismiss a bill on the hearing, although there was no demurrer to the bill. (p. 606.)

2. A court of equity has no jurisdiction to settle the title and boundaries of land, when the plaintiff has no equity against the party, who is holding the land. (p. 606.)

3. To warrant the interference of a court of equity to restrain a trespass on land, two conditions must co-exist: *first*, the plaintiff's title must be undisputed or established by legal adjudication; and *second*, the injury complained of must be irreparable in its nature, unless there exist other grounds of equity. (p. 606.)

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4. It is not sufficient in such case, that the bill contain general allegations of irreparable injury; the facts constituting such injury must be set forth. (p. 606.)

The facts of the case appear in the opinion of the Court.

A. F. Haymond for appellant.

J. Brannon and *J. A. Brown* for appellee.

JOHNSON, PRESIDENT:

At February rules, 1882, the plaintiff, Ruhama Cresap, filed her bill in the circuit court of Preston county against Catharine Carroll, afterwards Catharine Kemble, in which she alleged title to certain land in her bill described, situated in said Preston county. She also alleged, that "a part of her said land was in the woods, and that there was a coal-bank opened on said land." The bill charges, that the defendant, Catharine Carroll, "is advised and is preparing to enter on said land and drive your oratrix and her hands out of her enclosure, and cut and sell the timber and run the coal-bank," while she was restrained by an injunction until the title to the land could be tried; that she is advised, "that said Catharine Carroll has not now nor ever had a deed or paper-title to said land, but claims it by virtue of repeated trespasses on the same;" that "the land in dispute is timber land with a small vein of coal on it, and if said Catharine Carroll and her hands are permitted to consume the same while she is enjoined, there will be little left to dispute about; that she is advised, "that it is the province of a court of chancery to direct an issue in such a case as the present in the form of an ejectment, the only real action now left us to definitely try and settle the title to lands." She prayed an injunction, which was granted by the judge in vacation on January 16, 1882, and is endorsed on the bill. There is no allegation of insolvency in the bill nor any allegations, which show that irreparable injury would result, if the injunction were not granted.

The injunction referred to in said bill was granted by the judge of the circuit court of Preston county on July 12, 1880, which was endorsed on a bill filed by Catherine Carroll against Gustavus Cresap, Ruhama Cresap and Gustavus J.

Cresap, in which the plaintiff alleges title to the same tract of land, and that it is covered with valuable white oak and other timber, and charges that defendants are engaged in cutting said white oak timber and manufacturing the same into boards, rails, &c. and are cutting and removing timber therefrom, and thus committing great waste on the said land "to the irreparable damage of your oratrix"; that said land is valuable principally on account of the large and fine white oak timber thereon; that the said trespasses are destructive of the substance of the property and of what gives said property its chief value or a material part thereof, and that the injury actual and threatened is irreparable and not capable of pecuniary compensation; that plaintiff has instituted and has now pending on the law side of the court an action of trespass against said defendants, yet they persist in committing great waste. She prays an injunction against the defendants, their agents, &c., from cutting or sawing timber, brush or bushes on the said tract of land, and from removing the same, or any clapboards, staves, rails, poles or timber of any kind from said land" and for general relief. This bill does not charge the insolvency of the defendants, nor does it state any facts to show, that the trespass, if not enjoined, could not be compensated in damages.

In May 1882, the said Catharine Carroll filed an amended bill, in which she alleged her inter-marriage with Dr. Julius C. Kemble and claims, that she has the right to carry on the suit in her name as Catharine Kemble without joining her husband with her, as the suit relates alone to her separate estate. She sets up her claim of title more fully, and repeats the prayer of the original bill. On April 12, 1883, Catharine Kemble filed her answer to the bill of Ruhama Cresap, denying her title to the land, &c. In September 1880, Ruhama Cresap, Gustavus Cresap, and Gustavus J. Cresap filed their joint answer to the bill of Catharine Carroll, denying her title to the land, &c. At July rules 1882, the said defendants filed their joint answer to the amended bill. On August 17, 1882, Ruhama Cresap filed her separate answer to the amended bill of Catharine Kemble, denying the title of the plaintiff's &c. Numerous depositions were taken, particularly upon the question of title. On April 16, 1883, the two causes by

consent were heard together upon the pleadings and proofs; and in the cause of Catharine Kemble against Ruhama Cresap and others it was decreed *that the injunction* be made perpetual, and that she have costs, and in the cause of Ruhama Cresap against Catharine Kemble the court decreed that the injunction be dissolved and the bill dismissed but without costs.

From this decree the Cresaps appealed.

There was no demurrer to either of the bills filed in either of these causes. The Court will nevertheless, unless the court below had jurisdiction, upon the hearing dismiss the bill. (*Morehead* v. *DeFord*, 6 W. Va., 316.)

Had the court jurisdiction of either of these causes? Both bills were filed to enjoin trespasses to real property and settle the title thereto without any charge of insolvency against the defendants in either bill and without the allegation in either of any facts, from which the court could see, that unless the defendants were enjoined, irreparable damage would result. It is well settled that a court of equity has no jurisdiction to settle the title and boundaries of land, where the plaintiff has no equity against the party, who is holding the land. (*Lange* v. *Jones*, 5 Leigh. 192; *Hill* v. *Proctor*, 10 W. Va., 50.) An injunction is not granted to restrain a mere trespass to real property, when the bill does not clearly aver good title in the plaintiff, nor then as a general rule, where the injury complained of is not destructive of the substance of the inheritance, of that which gives it chief value, or is not irreparable but is susceptable of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the law courts. (*McMillen* v. *Ferrell*, 7 W. Va. 223; *Cox* v. *Douglas*, 20 W. Va. 175; *Schoonover* v. *Bright*, 24 W. Va. 698.)

To warrant the interference of a court of equity to restrain a trespass upon real property, two conditions must co-exist: *first*, the plaintiff's title must be undisputed or established by legal adjudication; and *second*, the injury complained of must be irreparable in its nature, unless there are other equitable grounds for interference. It is not sufficient in such case, that the bill contains mere general averments of irreparable injury, but the facts constituting such injury must be set forth. (*Schoonover* v. *Bright*, 24 W. Va. 698.)

These principles are fatal to both bills in these causes. Equity has no jurisdiction of either of the said causes. The pleadings and proof in both causes show, that the title was in dispute, and that the parties have gone into a court of equity to settle the title to the land, which could only be done in a court of law.

In my opinion the injunction would not lie in this cause to restraining the taking of coal from an open mine, when the proof does not show that the coal constituted the chief value of the land. In *Anderson* v. *Harvey's Heirs*, 10 Grat. 386, it was held, that an injunction was proper to restrain the removal of iron ore from a tract of land; but there the iron ore constituted almost the entire value of the land. Daniels, Judge, in delivering the opinion of the court said: "The land, on which the trespass is alleged to have been committed, is proved to be of little or no value except for the iron ore found upon it, which is proved to be of excellent quality. The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it." But it is unnecessary to decide this question as the title to the land was in dispute.

So much of said decree, as refers to the case of Ruhama Cresap *v.* Catherine Kemble and dissolves the injunction and dismisses the bill, is affirmed; and so much of said decree, as perpetuates the injunction and gives costs in the cause of Catherine Kemble *v.* Ruhama Cresap and others, is reversed with costs to the appellants; and the injunction in said cause is dissolved, and the bill dismissed with costs to the defendants in the court below.

AFFIRMED IN PART. REVERSED IN PART.

CHARLESTOWN.

POE *et al.* *v.* PAXTON'S HEIRS *et al.*

Submitted June 22, 1885.—Decided October 2, 1885.

1. The vendor of an equitable right or title to land retains an implied lien on it for the consideration, whenever under the same circumstances the vendor of the legal title would hold an equita-

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ble lien. The same principle and reason apply to both cases, except that our statute—sec. 1, ch. 75 of Code—qualifies the latter, while it has no effect upon the former. (p. 609.)

2. Such implied equitable lien of the vendor of an equitable title or estate, where the contract of sale is unrecorded, will be enforced by a court of equity against the vendee, his heirs, purchasers with notice and his unsecured or general creditors, but not against purchasers for value without notice, nor against mortgage, or trust-creditors with or without notice. (p. 611.)

3.—*Quære.*—Is not such equitable vendor's lien paramount also to the liens of the judgment-creditors of the vendor? (p. 612.)

The facts of the case are stated in the opinion of the Court.

W. A. Anderson and *McCorkle & McCorkle* for appellant.

W. S. Laidley for appellee.

SNYDER, JUDGE:

This and other suits in equity heard with it, were brought in the circuit court of Kanawha county against the administrator and heirs of J. G. Paxton, deceased, to subject the real estate of said Paxton to the payment of his debts. After sundry references and reports had been made and decrees entered ascertaining and fixing the priorities of said debts, B. J. Jordan filed his petition in the suits asserting that his debt therein mentioned, and which had been theretofore reported as a non-preferred and unsecured claim, should be allowed and declared to be a specific lien on one-ninth of the tract of 1764 acres of land in Fayette county, known as the "Crescent" property. The basis of this claim of Jordan, as appears from the said petition and other parts of the record, is as follows:

By written contract, dated December 16, 1856, between James G. Paxton of the one part and B. J. Jordan and others of the other part, the said Paxton sold, and agreed to convey by deed with general warranty within ninety days from said date, to the said Jordan and others the undivided one-third part of a tract of 1764 acres of land situate in Fayette county, at the price of $9,000.00 to be paid in five equal instalments at four, six, nine, twelve and fifteen months from

date. The contract provided that the said Jordan was to have one-third of said purchase or one-ninth of the whole tract which would be 196 acres and was to pay therefor $3,000.00 as above specified. Accordingly Jordan paid four instalments of $600.00 each of the purchase-money, making in all $2,400.00, leaving $600.00 still unpaid.

Subsequently, on May 1, 1867, the said Paxton and Jordan made the following agreement in regard to said Jordan's interest in said purchace, viz:

"That the contract of December 16, 1856, for the sale of an interest in Kanawha coal land to B. J. Jordan is hereby cancelled, and the amount paid by said Jordan to said Paxton is to be refunded, with interest from the time the same was paid, unless the said Paxton has paid the same already for the benefit of said Jordan."

Upon a reference to a commissioner to ascertain the facts in regard to said Jordan's claim, the commissioner reported that neither of the contracts aforesaid had ever been recorded in Fayette county, that the $2,400.00 paid by Jordan to Paxton had never been refunded by the latter and was still due to the said Jordan; that said debt did not constitute an equitable or specific lien on any portion of said land as against the creditors of said Paxton, and that it must be treated and held to be an unsecured debt to be paid ratably with the other general debts due from the estate of said Paxton. Jordan excepted to the report upon the ground that the commissioner did not report his said debt as a specific lien on the interest purchased by him in said 1,764 acres of land. The court by its decree of July 13, 1883, confirmed said report and decreed that said debt was not a specific lien upon any part of said land, but that it was an unsecured debt and payable only as such along with the general creditors of the estate of said Paxton. From this decree Jordan obtained this appeal.

The only question sought to be determined by this appeal is, has the appellant a specific or equitable lien on any part of the tract of 1,764 acres of land for his debt and its interest?

It is elementary law, that when a vendor sells land on time he has a lien on the whole subject sold for his unpaid purchase-money. 2 Story's Eq. Jur. § 1218.

The only modification of this general doctrine is, that by our statute, when the vendor *conveys* the land by deed he shall not thereby have a lien for his unpaid purchase-money unless such lien is expressly reserved on the face of the conveyance. Sec. 1, ch. 75 Code, p. 475.

This statute has no application, it will be perceived, where no conveyance is made by the vendor. By retaining the legal title the vendor preserves his lien unaffected by the statute. It is clear, therefore, that under the sale made by Paxton to Jordan, the former by retaining the legal title preserved his lien for the unpaid purchase-money. This much can not be disputed. The material enquiry in this cause is whether or not the contract of May 1, 1867, between these parties was in effect a re-sale of the land by Jordan to Paxton; and, if so, does a lien for the money agreed to be refunded attach in that case?

Jordan by his purchase became the owner of the land in equity and the vendor, Paxton, became his trustee of the legal title. By the terms of his contract Jordan was entitled to compel Paxton to convey him the legal title within ninety days from and after the date of the sale which was before all the purchase-money became due. Suppose then after Jordan had paid the $2,400.00 of the purchase money, Paxton had conveyed the land to him; and after this had been done, the parties had entered into the contract of May 1, 1867, for re-vesting the title in Paxton, the latter could not have required Jordan to re-convey the legal title without re-paying the purchase money. This latter transaction in that event would, it seems to me, have been of necessity treated as a re-sale of the property by Jordan to Paxton and all the incidents of a sale would have attached to it including the equitable lien for the unpaid purchase-money. Because the transaction here relates to an equitable and not a legal title, can not certainly affect the substance of it in a court of equity. It was held in *Stuart* v. *Hatton*, 3 J. J. Marsh. 178, that, "One who sells an equitable right to land, retains a lien on it for the consideration, whenever, under the same circumstances, the vendor of the legal title would hold an equitable lien. The same principle and reason apply to both cases." This seems to be the settled law on the subject in Kentucky.

Lejon v. *Alexander*, 7 J. J. Marsh. 288–9; *Galloway* v. *Hamilton*, 1 Dana 576; and it has also been so decided in Maryland.—*Inglehart* v. *Armizer*, 1 Bland 519, 526. This doctrine I regard as reasonable and it has to some extent been recognized and acted upon by the courts of Virginia and this State.—*Moore* v. *Holcomb*, 3 Leigh 601; *Mitchell* v. *Dawson*, 23 W. Va. 86.

The principle is, that this lien exists in equity presumptively, when the purchase-money, or any part of it, remains unpaid; and it is for the vendee to show such circumstances as repel the presumption or rebut the equity. 1 Lead. Cas. Eq. (top p.) 272. "*Prima facie* the purchase-money is a *lien*, and it lies on the vendee to show the contrary; and the death of the vendee does not alter or defeat the *lien*." *Garson* v. *Green*, 1 Johns. Ch'y 208; *Thompkins* v. *Mitchell*, 2 Rand. 428; *Redford* v. *Gibson*, 12 Leigh 332.

Upon a fair construction of the contract of May 1, 1867, there is nothing to indicate a purpose on the part of Jordan to waive this *prima facie* lien for the purchase-money paid by him and which Paxton bound himself therein to refund, and there is no evidence in the record of any facts or circumstances even tending to show such waiver. The burden of showing that it was not the intention of the parties that the lien should attach being upon the vendee, in the absence of any such implication in the contract itself or of extraneous proof, the lien according to the authorities must be held to exist.

The contract here being in relation to an equitable and not a legal estate, our statute which requires the grantor in a deed to retain an express lien in the conveyance has no application. It may, therefore, be considered that the contract of May 1, 1867, was an executed and not an executory agreement, that it was in fact, and intended by the parties to be an absolute cancellation of the contract of December 16, 1856, and a complete re-conveyance of the equitable title of Jordan to Paxton, and still, according to the rules of equity, the lien for the purchase-money, which Paxton bound himself by that contract to refund to Jordan, would attach and be unaffected by the statute.

The next enquiry is against whom will this equitable lien

be enforced? The general rule is, that such lien will prevail and be enforced not only against the purchaser, but against his heirs, and all persons claiming under him with notice, although for a valuable consideration. 2 Sug. on Vendors 22.

The rule deduced from the Virginia decisions is stated in 4 Min. Inst., Part I., pp. 67–8, as follows:

"A vendor of land is considered in equity as having a lien on the land for the purchase-money unpaid, not only as against the vendee himself, but also against all persons claiming under him, unless they are purchasers *for value* and *without notice*, save when the lien has been intentionally waived by consent of parties which it is for the vendee to show,"—citing 2 Story's Eq., sec. 1217; *Beirne* v. *Campbell*, 4 Grat. 125; *Kyles* v. *Tait* 6 *Id.* 48; *Stephens* v. *Hutchinson*, *Id.* 147; *McCandlish* v. *Keene*, 13 *Id.* 621, and other cases. The author then adds: "Though recognized, this rule has not been regarded favorably by the courts, because violative of the policy which seeks to discourage *secret liens*,"—citing *Moore* v. *Holcomb*, 3 Leigh 597; *Brawley* v. *Catron*, 8 *Id.* 522; *Bayley* v. *Greenleaf*, 7 Wheat. 46; and *McCandlish* v. *Keene*, 13 Grat. 621–2.

In *Bayley* v. *Greenleaf*, *supra*, the court decided that: "A vendor can not enforce his lien for unpaid purchase-money against trustees for creditors of the vendee to whom the land has been conveyed without notice of the lien." The title sold in this case, on account of which the vendor asserted his lien, was an equitable title and the conveyance to the trustees appears not to have been recorded, and, therefore, the facts are very similar to the case at bar. See also, *Shirley* v. *Shirley*, 7 Blackf. 452; *Conner* v. *Banks*, 18 Ala. 42; *Griffith* v. *Depew*, 3 Marsh. 179.

In regard to the existence of this lien as against creditors, the cases are not uniform. It appears to be agreed that it does not prevail against a *bona fide* mortgagee without notice, for the reason that he is regarded as a purchaser in equity. *Duval* v. *Bibb*, 4 H. & M. 113; *Clark* v. *Hunt*, 3 J. J. Marsh. 553; *Moore* v. *Holcomb*, 3 Leigh 597.

In North Carolina, it was decided that it was subordinate to the rights of judgment-creditors. *Harper* v. *Williams*, 1 Dev. & Bat. 379; *Id.* 32, 35. It is settled in Tennessee that such lien will not be sustained against judgment-creditors. *Roberts* v. *Rose*, 2 Humph. 145.

After a full review of the cases the doctrine is stated in 1 Lead. Cas. Eq. (top p.) 279, as follows: "The true nature of the claim appears to be this. It had its origin in a country were lands were not liable, both during and after the life of the debtor, for all personal obligations indiscriminately, including debts by simple contract; and it seems to be an original and natural equity, that a creditor whose debt was the consideration of the land should, by virtue of that consideration, be allowed to charge the land upon failure of personal assets: It is not a lien until the bill has been filed to assert it; before this is done, it is a mere equity or capacity to acquire a lien and to have satisfaction of it. When a bill is filed it becomes a specific lien. This equity no doubt dates back to the time of the conveyance and to the origin of the debt. As soon as the debt for the purchase-money exists, though to be paid *in futuro*, the equity to come upon the land attaches to it. Therefore, it prevails against dower, and all other estates which the law considers as in privity with that of the vendee; it prevails against all who take with notice, actual or legal, for all such persons are considered as standing in the situation of the vendee. In such cases the dispute is between the vendor, on the one hand, and the vendee and his representatives on the other. But where subsequent lien-creditors intervene, the contest is no longer between the vendor and vendee; it is between third persons contending for his estate. It depends no longer on the equity of the one party as against the vendee and those in privity with him; it depends upon the relative equities and rights of the disputants, in a comparison with one another. If this be the correct view of the nature of the vendor's claim the question is at an end. Lien-creditors will supplant one who, though he had a right in equity to charge the land through his own *laches* and default, failed to secure a lien. Lien-creditors are entitled to the whole estate of their debtor, subject only to prior specific liens, legal or equitable; if the vendor's equity be neither a specific lien, nor a trust qualifying the estate in equity, the right of lien-creditors is paramount to it. The principle then is, the vendor's equity, though prevailing against the vendee and all claiming through him, is subordinate to the rights of subsequent lien-creditors with or without notice."

In *Gilmore* v. *Brown*, 1 Mason 192, 221, Story J. says: "The lien of the vendor for the purchase-money, is not of so high and stringent a nature as that of a judgment-creditor, for the latter binds the land according to the course of the common law; whereas the former is a mere creature of a court of equity, which it moulds and fashions to its own purposes. It is in short, a right which has no existence, until it is established by the decree of a court in the particular case, and it is then subservient to all other equities between the parties, and enforced in its own peculiar manner, and upon its own peculiar principles."

The necessary conclusion from the views thus stated is, that this implied equitable lien for unpaid purchase-money can not prevail against purchasers for value without notice, nor against liens of mortgages, trust or judgment-creditors, but that it will be enforced only against the vendee, his heirs, parchasers with notice and the general or unsecured creditors of the vendor. This is all that is claimed by counsel for the appellant in this cause and, I think, it is all that he is entitled to. *Moore* v. *Holcomb*, 3 Leigh 597. But as some members of this Court are unwilling to decide definitly, (as such decision is not asked and does not appear to be material in this cause, so far as the record before us discloses,) that this equitable lien is not paramount also to the liens or rights of judgment-creditors of the vendor, that question is left undecided.

For the foregoing reasons the said decree of July 13, 1883, is reversed, and this cause is remanded to the circuit court for further proceedings there to be had in accordance with the principles announced in this opinion.

REVERSED. REMANDED.

CHARLESTOWN.

BAILEY *et ux.* *v.* STROUD AND TRAIL.

Submitted June 24, 1884.—Decided October 2, 1885.

A tract of land was sold on December 15, 1862 in Mercer county with reference to Confederate States treasury-notes, as a standard of

value, for the price of $1,000.00 of which $500.00 was in hand paid and a bond for $500.00 payable twelve months thereafter given for the residue. In a suit in equity brought by the assignee of the vendor, to enforce the vendor's lien against the land for the amount of the bond of $500.00 given for the unpaid purchase-money. HELD:

I. That the amount of unpaid purchase-money specified in the $500.00 bond must be reduced to its value in gold, as of the date of said bond.

II. That the true value of such Confederate States notes was neither the actual value in gold of the property sold at the time of the sale thereof, nor the actual value in gold of the Confederate "dollars" specified in said $500.00 bond, nor the price at which gold was selling in Confederate States treasury-notes in Richmond or elsewhere in the Confederate States than in said county of Mercer.

III. That the true value of such notes should be ascertained and measured by the average purchasing power of gold in Mercer county of all kinds of property, real and personal, just before the civil war commenced, compared with the average purchasing power of such Confederate States treasury-notes in said county at the date of said bond.

IV. That it was error to assume that the true value of the unpaid purchase-money was the actual value of the land in "good money" at the date of the sale thereof less the amount of the down payment of $500.00; and,

V. That the cause should have been referred to a commissioner to ascertain the true value of the unpaid purchase-money as of the date of December 15, 1862, according to the principles here laid down, and to those established by this Court in *Bierne* v. *Brown's Administrator, &c.*, in 10 W. Va. 748.

WOODS, JUDGE, furnishes the following statement of the case:

This was a suit in equity brought at February rules, 1871, in the circuit court of Mercer county by the plaintiff Elizabeth Smith now the wife of Enos Bailey, against William D. Stroud, Matthew Bolton and his wife Mary W. Bolton, and Jacob Trail, which was afterwards transferred to and heard by the circuit court of Summers county. The material allegations of the bill were in substance, that said Matthew Bolton on December 15, 1862, sold to the defendant Stroud, a tract of land in Mercer county containing about 200 acres,

and described as lying "on Davis fork of Brush creek, adjoining lands of Jacob Lawman and others, and is the same land now occupied by said Jacob Trail;" that the price of the land was $1,000.00, of which $500.00 was paid in hand, and for the residue Stroud executed to said Bolton his bond of that date for $500.00, payable twelve months thereafter, that the legal title to said land was vested in the female plaintiff and her sister said Mary Bolton, who were ready to convey the land whenever directed to do so; that the money due upon said bond of $500.00 had been transferred to the female plaintiff, who claims a vendor's lien on said land, which had been sold by Stroud to said Jacob Trail, and prayed for a personal decree against Stroud for the amount of the bond, and a sale of the land to satisfy the same.

The defendants Stroud and Trail answered the bill, but the answer of Stroud is not in the record; that of Trail was filed in September, 1871, and in May, 1873, he filed an amended answer. Taken together Trail's answers admit the sale as set out in the bill, and for defence in substance allege: that the purchase-money was to be paid and so far as the same has been paid, was paid in Confederate States treasury-notes, called Confederate money; that the down payment of $500.00 was paid, in Confederate treasury-notes, and the deferred payment sought to be enforced was to be paid in Confederate treasury-notes, that these notes were tendered at the proper time, and kept, and were always ready for said Bolton, until they became entirely worthless, and he insists, that "he *ought not to be required to pay more than the value of the Confederate notes, when the bond fell due,* if anything," and he averred that at that time such Confederate notes were not worth more than one-twentieth part of the value of gold in Mercer county, and asked that this value may be ascertained, and that he may be required to account only for its value when ascertained. He also averred that said Bolton had sold said Stroud 200 acres, and that he had bought only 100 acres, and asked that the 100 acres retained by Stroud may be first sold to pay the plaintiff's demand. It will be observed that while the defendant Trail does not pretend that any part of the $500.00 bond has ever been paid by Stroud or himself, or that the same is not a vendor's lien on the land owned by him, he

tacitly admits that he is bound to pay whatever amount may be ascertained to be due thereon, and only insists he shall not be made liable for any greater sum. To the answers of Stroud and Trail general replications were filed. The bond for the $500.00 is in the words and figures following:

"$500.00.

"Twelve months after date, I bind myself, my heirs, &c. to pay Matthew W. Bolton five hundred dollars, it being for land lying in Mercer county, Virginia on Davis fork, waters of Brush creek. Witness my hand and seal this 15th day of December, 1862.

"W. D. STROUD. [Seal.]"

A large number of depositions taken by plaintiff and defendant Trail, were read on the hearing on the 13th day of October, 1873. From these depositions it is clear that the contract of sale was made and the $500.00 bond executed in Mercer county, wherein the land lay and the parties then resided; that Bolton was strongly in sympathy with the cause of the Confederate States, and had unlimited confidence in Confederate states treasury-notes and currency, and that he was in its military service. One of the defendant's witnesses, the truth of whose statements is not contradicted, testified that: "Said Bolton at one time asked my advice about selling his land, telling me he was going to sell it to Mr. Stroud for $1,000.00 in Confederate money. I told him he could do as he pleased, but as he had asked me about it, I would be plain with him; that if I had his land, and was not obliged to have the Confederate money to get along on, I would not give the land for all the Confederate money in the Confederate States of America. He replied to me after a minute or two, that if he had all the land, he would sell it for Confederate money." The testimony tended to show that in 1862, Confederate currency in Mercer county was rating at par; that in December 1863 it was rating very low, and was continually depreciating and that about that time, it required eighteen of currency to purchase one of gold; that the land sold by Bolton to Stroud was on the 15th of December, 1862, worth from $800.00 to $1,000.00 in good money," and was sold by Stroud to Trail for $1,500.00 in Confederate currency. A son of the defendant Trail testified that in February 1864, when Bolton was at

home on a scout, his mother informed him they had bought from Stroud the land which he had sold to him, and had reserved of the purchase money $500.00 to pay him, and offered him a large amount in Confederate treasury notes which he refused to receive. The deposition of Bolton was taken, and he contented himself with stating that when the trade was made and the note executed nothing was said as to the kind of money in which it was to be paid, but he did not pretend to deny, that the down payment was made in Confederate notes or that the deferred payment was not to be paid in the same currency. The defendant Trail was not examined as a witness, nor was the title bond for Bolton to Stroud, or from Stroud to Trail produced or the contents thereof proved. Other testimony was introduced, tending to show that the sale was in fact for Confederate money.

On the 13th of October 1873, the circuit court entered the following decree.

"And in the same court, on October 20, 1873, in the same cause, this cause came on October 20, 1873, to be heard upon the process regularly executed upon the defendant, upon *the bill* and exhibits regularly filed, upon the amended bill, upon the separate answers of W. D. Stroud, Jacob Trail and the amended answer of Jacob Trail, upon replication to said answers, upon the depositions, and upon arguments of counsel. And the court being of opinion that Mathew Bolton was the agent for the plaintiff as well as for the wife of Bolton, and that he sold the said land to Stroud with reference to Confederate treasury-notes as a currency, and being of opinion that the said bond sued on by the plaintiff, and exhibited with bill for $500.00, was of the value of $350.00, and that the plaintiff has right to recover for the $350.00 as of the day the said bond fell due, to-wit, on Decembr —, 1863; but the court unable to ascertain how much said Stroud has paid to the said Bolton upon the said bond, it is ordered, adjudged and decreed that this cause be referred to R. C. McClaugherty, who is appointed a special commissioner by consent, who shall take an account of the payments made by William D. Stroud to Mathew Bolton, including the $25.00 filed in this cause. And it appearing that defendant Trail claims only 100 of the 200 acres of land sold by Bol-

ton to Stroud, and that this is undivided, it is ordered and decreed that Robert Hall, William Cooper and J. S. Crockett are hereby appointed commissioners to go upon said land and lay off and divide the same into two equal parts, quantity and quality regarded, and they shall assign to defendant Trail that part upon which his improvements shall fall, as far as the same may be done. And the question as to the interferance of the claim of Cloyd, raised by the answer of Trail, is reserved for the further hearing of this cause. And when it shall be ascertained what amount is due to the plaintiff, this court will direct a sale of the 100 acres of land assigned to defendant W. D. Stroud, or so much thereof as may be necessary to pay the plaintiff her claim and the costs of this suit; and if the said 100 acres assigned to Stroud be insufficient to raise the sum above decreed, then the court will proceed to sell enough of the 100 acres of land assigned to Trail to raise said sum, but no sale of the land will be directed until the plaintiff and Bolton and wife shall make, properly execute and acknowledge a deed for the land sold Stroud, and file the same with the papers in this cause, to be recorded upon the payment of the purchase-money."

On May 5, 1874, the defendants Bolton and wife tendered and offered to file their joint answer to the plaintiff's bill, admitting a sale of land to Stroud at the price and upon the terms stated but expressly denying that any other or greater portion of the 200 acres owned jointly by the female plaintiff and the respondent Mary Bolton had been sold to Stroud than the 100 acres which he had sold to the defendant Trail, all of which lay on the south side of the Red Sulphur road and that the residue of the 200 acres, is still owned by them, and is in their possession and has never been claimed by any other person. At the same time the plaintiff tendered and offered to file her amended bill, correcting the description of the land therein alleged to have been sold to Stroud, so as to confine the same to so much of the 200 acres as lies south of the Red Sulphur road, being the same sold by Stroud to Trail.

By its decree of May 5, 1874, the circuit court refused to allow said answer and amended bill to be filed, but made the

same, as well as its reasons for such refusal, parts of said decree.

The commissioner, to whom the cause was referred by the decree of October 13, 1873, returned his report April 13, 1874, assuming the $500.00 note to be of the value of $350.00, with interest from December 15, 1863, as ascertained by said decree, submitted three statements of the balance due thereon as of April 7, 1874, showing the same to be respectively $536.17, $496.21 and $542.33, without deciding which ought to be adopted.

On May 9, 1876, the cause was transferred to the circuit court of Summers county, where the plaintiffs filed at rules an amended bill in substance the same as that rejected by the decree of May 5, 1874, which was regularly matured; and on February 17, 1883, the circuit court of Summers county heard the cause upon the original and amended bills, demurrers and several answers thereto, and upon the answer of Jacob Trail filed at this term, depositions, reports of commissioners, exceptions thereto at this date taken, upon the decrees heretofore rendered herein, and all other papers heretofore read, upon consideration whereof, it was among other things adjudged, ordered and decreed, (the defendant Mary Bolton consenting thereto,) that the plaintiffs recover of said Stroud $689.08 and the costs of suit; that the same is a lien on that part of the land in the bill and proceedings mentioned lying on the south side of the Red Sulphur turnpike, and that Stroud never purchased that part of said land lying on the north side of said turnpike road, and provided that unless the said Stroud or some one for him should pay the plaintiffs said moneys, that a special commissioner appointed for the purpose should sell the said land on the usual terms, &c.

From this decree, as well as from decrees of the same court rendered on September 9, 1881, and on February 16, 1882, and from the decrees of the circuit court of Mercer county, rendered on May 6, 1873, and on May 5, 1874, the defendant Jacob Trail obtained an appeal and *supersedeas*.

J. W. Davis and *J. M. French* for appellant.

E. W. Wilson for appellee.

WOODS, JUDGE:

The appellant has assigned the following errors:

First.—In not referring the cause to one of its commissioners to settle the accounts between the parties and ascertain the value of the Confederate $500.00 that were unpaid.

Second.—The court erred in fixing the value of the $500.00 at $350.00. There was no proof of the value of the land. The Confederate money was, according to the proof, not less than eighteen for one.

The Summers circuit court erred:

Third.—In permitting the amended bill of 1879 to be filed.

Fourth.—It was error to refer the cause to commissioner Peck.

Fifth.—If the cause had been referred, the reference should have been a full one. The commissioner should have been directed to take an account between the parties.

Sixth.—The statute of limitations barred the claim.

Seventh.—W. D. Stroud proves the debt fully paid.

Eighth.—Bailey and wife released Stroud from the payment of the debt, and the release enured to the benefit of Trail, his vendee.

Ninth.—It was error not to dismiss the amended bill.

The last seven errors assigned are easily disposed of. The supposed necessity for the amended bill filed in 1879, grew out of a misapprehension by the court in its decree of October 13, 1873, that the description of the land, in the original bill, alleged to have been sold by Bolton to Stroud, included all of the tract of 200 acres of land owned jointly by the plaintiff and her sister, Mary W. Bolton, instead of only so much thereof as had been sold by Stroud to the defendant Jacob Trail. The original bill described the land sold by Bolton to Stroud as a "tract of land in Mercer county on Davis' fork of Brush creek, adjoining lands of Jacob Lawman and others containing *about* 200 *acres, and is the same land now occupied by said Jacob Trail.*" Whatever land was then occupied by Trail lying in said county on Davis' fork of Brush creek, adjoining the lands of Jacob Lawman and others, was the land sold by Bolton to Stroud, and it was wholly immaterial what number of acres it was supposed to contain. Trail expressly states in his answer that he purchased from Stroud,

and only claims 100 acres, and Stroud testified that he sold to Trail the same land which he had purchased from Bolton, for which he paid down $500.00, and executed said $500.00 bond for residue of the unpaid purchase-money. The joint answer of Bolton and wife, as well as the amended bill, rejected by the decree of May 5, 1874, attempted to correct this supposed mis-description, and the amended bill of 1879, did nothing more, and the court did not err in permitting the same to be filed, although there was no necessity for filing the same as the whole matter was fairly in issue upon the original bill. Neither did the circuit court err in referring the cause to commissioner Peck to hear evidence and make report at its next term whether said Bolton sold to said Stroud the land in the bill and proceedings mentioned, lying on both sides of the Red Sulphur turnpike, or only the land on the south side of said turnpike on which the defendant (Trail) now lives; and to require the title-bond given by Bolton to Stroud to be produced before him, or else accounted for and its contents proved;" for, this was a proper mode of ascertaining the true boundaries of the land sold by Bolton to Stroud, as well as of the parcel sold by Stroud to Trail.

Neither was the plaintiff's demand barred by the statute of limitations, as it was evidenced by a single bill payable on December 15, 1863, while the plaintiff's bill was filed in February, 1871, but little more than seven years thereafter; neither was there sufficient, or any credible evidence showing that the debt had been paid, but on the contrary it is clear that it has not been paid; nor does the defendant Trail either in his answer, or amended answer to the original bill, or in his answer to the amended bill of 1879, pretend that the debt had been paid, but on the contrary as already stated, he tacitly admits that it had not been paid, and that he was liable to pay whatever amount might be ascertained to be justly due thereon. The pretended release, made by the plaintiffs to Stroud dated August 27, 1881, and filed with the deposition of the witness Kitts is neither mentioned nor referred to, in the answers of Trail, nor in any of the pleadings, and was never in issue between the parties; and if it had been, it amounts only to an agreement that if the plaintiffs shall succeed in obtaining the relief prayed for, they would in

case of a sale thereof make the said land lying on the south side of the Red Sulphur turnpike road, bring enough to discharge the amounts decreed to the plaintiffs. For the reasons above stated we are of opinion that the circuit court did not err in regard to the matters referred to in the appellant's last seven assignments of error.

The first and second grounds of error assigned present for our consideration the following questions: What was the true understanding and agreemeent between said Bolton and Stroud in respect to the kind of currency in which their contract for the sale of said land was to be fulfilled or performed, or with reference to which as a standard of value the contract between them was made; and if the same was made with reference to Confederate treasury-notes as a standard of value, and was to be discharged on the part of Stroud by the payment of the value of such currency, how is the value thereof to be ascertained? Is it the actual value in gold of the property sold at the time of the sale; or is it the actual value in gold of Confederate "dollars" mentioned in the said bond of $500.00, at the time the same became payable; or is it the average purchasing power of gold in Mercer county, of all kinds of property real and personal, just before the civil war commenced, as compared with the average purchasing power of Confederate treasury-notes in that county on December 15, 1862, the date of the bond?

The right to show by parol or other relevant testimony the true understanding and agreement of the parties in respect to the kind of currency in which the same was to be fulfilled, has been secured by ch. 116 of the Acts of the Legislature passed on April 7, 1873, by which it is enacted, first: "That in any action, suit or other proceeding for the enforcement of any contract express or implied, where such contract was for the sale or purchase of any real or personal property made, or entered into between May 1, 1861, and May 1, 1865, it shall be lawful for either party to show by parol or relevant testimony what was the true understanding and agreement of the parties thereto either express or to be implied in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which as a satndard of value it was made or entered into; and in

an action at law or suit in equity it shall be unnecessary to plead the agreement specially in order to admit such evidence." Second: "Whenever it shall appear that any such contract was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury-notes, or Virginia treasury-notes, or was entered into with reference to said notes as a standard of value, the same shall be liquidated and settled by reducing the nominal amount due, or payable under such contract in Confederate States treasury-notes, or Virginia treasury-notes to its true value at the time they were respectively made and entered into, or at such other time as may to the court or if it be a jury case, to the jury seem right in the particular case, and upon the payment of the value as ascertained the party bound by such contract shall be forever discharged of and from the same," with a *proviso*, that if any part of such demand has been paid in such treasury-notes, the party making such payment shall have credit for the full amount so paid.

Although neither the bond for $500.00, nor so far as the testimony shows, the title-bond nor contract for the sale of the land, made between Bolton and Stroud expressly provided that the bond was to be discharged in Confederate States treasury-notes, yet as the contract was made in December, 1862, in Mercer county in Virginia, wherein the civil war between the governments of the United States and of the Confederate States, was flagrant, this Court will take judicial notice of the fact that the county of Mercer, in which the land lay, and in which the contracting parties resided was within the jurisdiction of the Confederate States, at the time the contract was entered into, and where the same was to be performed; the natural and reasonable presumption in the absence of all other evidence would be, that the contract was entered into with reference to Confederate States treasury-notes as a standard of value, and was to be performed and fulfilled by payment in such currency. *Simmons* v. *Trumbo*, 9 W. Va. 358; *Gilkeson* v. *Smith*, 15 W. Va. 44. Although the answer of Trail expressly alleged that the land was sold for Confederate States treasury-notes, and that the down-payment of $500.00 was paid in such notes, and the deferred payment of $500.00 was to be so paid, yet none of these

statements are denied, in the answers of Bolton and his wife, or in the original or amended bills, nor in any other manner than by the plaintiff's general replication to the answer of Trail; and when Bolton was examined as a witness he did not deny any of these allegations, but only said, "that neither when the contract was made nor afterwards was anything ever said about its being paid in Confederate money," while it is in proof that Bolton asked the advice of the witness about selling his land, telling him that he was going to sell it to Stroud for $1,000.00 in Confederate money, and afterwards told the witness he had closed the trade, while Stroud testified that he bought the land for $1,000.00 to be paid in Confederate money; that he paid $500.00 of it down and executed his note for $500.00, payable some time afterwards, and sold the same land to Jabob Trail. From these facts and circumstances the circuit court held that said Bolton sold the land to Stroud with reference to Confederate treasury-notes as a currency, and fixed the value of the $500.00 bond at the value of $350.00, as of December 15, 1863, when the same became payable, and this valuation is carried into the decree of the circuit court of Summers county rendered herein on February 17, 1883. It is not very clear from the proofs in this cause, by what mode of calculation the circuit court of Mercer county ascertained the value of the $500.00 bond. The testimony tended to show that when the land was sold on December 15, 1862, it was worth as much as from $800.00 to $1,000.00 in good money, and that Stroud sold it to Trail for $1,500.00 in Confederate money; that in December, 1863, there was no fixed standard of value of Confederate money in Mercer county, but it was very low in value and was constantly falling, while other testimony tended to show that it was worth only about one-eighteenth as much as gold. There was but little evidence to show what was the actual value of Confederate treasury-notes in gold in that county in December, 1862, or what at that time was their purchasing power, of all kinds of property, compared with that of gold just before the commencement of the civil war. It is probable that the circuit court considered the land at the time of the sale as of the value of $850.00, and giving the purchaser full credit for the $500.00 paid down, according to the said

act of the Legislature, treated the $500.00 of unpaid purchase-money, as of the value of the residue of the $850.00, assumed as the value of the land. Such was probably the mode adopted by the court, for we are not at liberty to presume that it disregarded the evidence in the cause upon this subject, and fixed a mere arbitrary valuation upon the Confederate States treasury-notes necessary to the discharge of said $500.00 bond.

This precise question was considered by this Court, in the case of *Beirne* v. *Brown's Adm'r, &c.*, reported in 10 W. Va. 748. The material circumstances in that, were almost identical with those of this case, except in that the land had been sold on December 26, 1862, in Monroe county for $25.00 per acre. That suit like the one under consideration was also brought to enforce the vendor's lien by a sale of the land for the unpaid purchase-money. In that case, upon proper defence made, the circuit court held, the sale to have been made with reference to Confederate States treasury-notes as a standard of value, and scaled the debt at the rate of $2.72 8–10 Confederate dollars for one in gold, being the value in gold of Confederate notes, in the city of Richmond, at the date of said sale. In that case this Court, after a full examination of all the cases adjudicated by the court of appeals of Virginia upon a statute of that State, from which our statute before cited was copied, construed the statute of this State, and held: "That the value of Confederate currency at the time it became payable, as compared with gold, should be ascertained by the average apparent appreciation in value of all kinds of property real and personal in the county where the same was sold, at the time when sold for Confederate money as compared with the value of such property just before the war commenced, when gold was the currency of the country; and that in ascertaining the value of Confederate currency, the price at which gold was then selling in Confederate currency in Richmond or elsewhere in the Confederate States, is not to be regarded as fixing the relative value of gold and Confederate notes." It follows therefore, that neither the actual value in gold of the property sold, at the time it was sold, nor the actual value in gold of the Confederate "dollars" mentioned in the $500.00 bond at the time the same be-

came payable, could be properly assumed as the true value of said $500.00, as of the date of December 15, 1862; but that the true value thereof should be ascertained and measured by the average purchasing power of gold in Mercer county of all kinds of property, real and personal, just before the civil war commenced, as compared with the average purchasing power of Confederate States treasury-notes in said county on December 15, 1862, when said $500.00 bond was executed.

The circuit court should have referred this cause to a commissioner, to ascertain the true value of $500.00 mentioned in said bond, at the time the same was executed, and ought not to have assumed the actual value of the land at the time of the sale, as in any degree fixing the true value of the Confederate States treasury-notes required to discharge the same.

We are therefore of opinion that there is no error in the decrees of the circuit court of Mercer county rendered herein on May 6, 1873, and on May, 5, 1874, nor in the decrees of the circuit court of Summers county rendered herein on September 9, 1881, and on February 16, 1882, and the same are hereby affirmed; but we are further of opinion, for the reasons hereinbefore stated, that the decree of the circuit court of Mercer county rendered herein on October 13, 1873, and the decree of the circuit court of Summers county rendered herein on February 17, 1883, are erroneous and must be reversed with costs to the appellent against the appellees Enos Bailey and his wife Elizabeth Bailey, and this cause must be remanded to the circuit court of Summers county, with instructions to refer the same to a commissioner to ascertain the true value of the $500.00 bond, upon the principles above stated, and on those settled by this Court in the cause of *Bierne* v. *Brown's administrator*, *&c.* in 10 W. Va. 748, and to be further proceeded in, according to the principles settled in this opinion, and according to the rules and usages in courts of equity.

REVERSED. REMANDED.

CHARLESTOWN.

McKINNEY *v.* HAMMETT *et al.*

Submitted June 19, 1885 —Decided October 2, 1885.

A defendant against whom a decree has been rendered upon bill taken for confessed can not appeal to this Court for the review of alleged errors in such decree until after he has first applied to the court below for the correction of such errors in the manner prescribed by sec. 5, ch. 134 of Code. If an appeal is granted from such decree it will be dismissed as having been improvidently awarded.

The facts of the case are stated in the opinion of the Court:

R. S. Blair for appellant.

No appearance for appellee.

SNYDER, JUDGE:

Suit in equity brought October 1880, in the circuit court of Pleasants county by James McKinney against George S. Hammett, Adam Flesher and others to ascertain the debts due from the estate of Solomon Clovis, deceased, and subject the real estate of which he died seized to the payment of the same, &c.

The cause was referred to a commissioner and a report of the debts and assets of the estate of said Clovis was made and returned by him which was confirmed by the court without objection or exception and the real estate directed to be sold. The sale was made and confirmed without exception by a decree entered March 12, 1884. On the petition of the defendant, Adam Flesher, this appeal was allowed September 6, 1884.

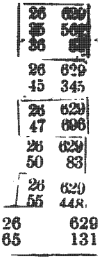
Neither the appellant nor any of the other defendants answered the plaintiff's bill or otherwise made any defence in the court below, but as to each and all of them the cause was heard and all the decrees entered upon the bill taken for confessed.

This Court has repeatedly decided that a defendant, as to whom a decree has been entered upon a bill taken for con-

fessed, can not have such decree reviewed by this Court, until he shall have first applied to the court below to have such decree corrected in the manner prescribed by sec. 5 of ch. 134 of the Code. *Baker* v. *W. M. & M. Co.*, 6 W. Va. 196; *Dickinson* v. *Lewis*, 7 *Id.* 673; *Bock* v. *Bock*, 24 *Id.* 586; *Steenrod* v. *Railroad Co.*, 25 *Id.* 133.

The appeal in this cause must, therefore, be dismissed as having been improvidently awarded.

DISMISSED.



CHARLESTOWN.

F. G. & L. C. JONES *v.* LEMON *et al.*

Submitted September 9, 1885.—Decided October 2, 1885.

1. It is well settled, that while in cases of direct or express trusts, as between the trustee and *cestui que trust*, the statute of limitations has no application during the continuance and recognition of the trust, yet if the trustee repudiates the trust by clear and unequivocal acts or words, and claims thereafter to hold and control the estate as his own not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*. (p. 634.)

2. Unless there is an express saving in the statute of limitations, no person will come within its exceptions, and the prescribed limitations will operate against persons under disabilities as well as others; and the express exceptions refer only to such disabilities as exist at the time the right of action first accrued; for while, if several disabilties exist together at that time, the statute will only begin to run at the cessation of the last of them, yet if a second disability occur after those then existing have ceased, it can not be pleaded; for it is the settled law that when the statute has once begun to run no subsequent event will interrupt it. (p. 635.)

3. When the subject is land, of which the trustee has the legal title, and the *cestui que trust* is a member of his family living upon the land, if the trustee, asserting title in himself, conveys a part of the land, by deed in his own name, to a third person whom he places in possession of the part so sold and takes the purchase-money to himself, the deed is put upon record and there is no

evidence that the trustee ever thereafter recognized the trust, but on the contrary claimed the residue of the land as his own; these acts and transactions will be regarded as a repudiation of the trust, and the statute of limitations will begin to run against the *cestui que trust* from that time. (p. 636.)

4. It is not necessary to the assertion of an adverse possession, that the party should be ignorant of the defects of his own title and have no knowledge of the rights of those against whom he claims. He may know he has a bad title and that another has the true title. Still if he occupies and claims the land as his own for the statutory period the title will by operation of the statute be transferred to him. (p. 636.)

A statement of the facts of the case will be found in the opinion of the Court.

R. W. Monroe for appellant.

John Barton Payne for appellee.

SNYDER, JUDGE:

In July 1851, Joseph Pratt, of Preston county died intestate leaving his widow and six infant children, the oldest being but fifteen years of age and the youngest *in ventre sa mere.* Before his death he had by executory contract purchased a tract of ninety acres of land, the legal title of which was in one Thomas, at the price of $200.00, of which he had paid $150.00. The other $50.00 was paid after his death by his widow in a horse belonging to his estate, and the land was conveyed by said Thomas to her by deed in fee. He resided on this land at his death and left very little, if any, other property. The widow finding herself unable to support herself and helpless children and retain the land, sold twenty acres thereof to Harmon Snider for $120.00, and by deed, dated July 10, 1855, conveyed the same to him by metes and bounds with general warranty of title and placed him in possession of it. In 1862, she sold twenty-three acres more to to one Bell for $125.00, and in 1866, she, by deed in which a part of her children united, conveyed the same to Costolo and Litzinger who had become the owners of the equitable title sold to Bell. She used the purchase-money derived from said sales for the support and education of her children.

The residue of the land was sold by the widow in 1869 to

Henry J. Snider for the price of $826.00, of which $600.00 was paid in a house and lot conveyed to her and $126.00, of the residue was to be paid when Joseph, one of her children, should attain his majority and transfer his interest in said land to the purchaser. In the deed conveying this land all the children united except the infant Joseph, and Abraham who was then dead.

By subsequent sales and conveyances the aforesaid twenty acres of land became the property of Charles McGee, the said twenty-three acres the property of David Albright, and the residue of the tract the property of Jackson Snider.

The widow about the year 1855, married one James Lemon who died some time between that date and the year 1869.

Abraham Pratt, one of said six children who was thirteen years old in 1851 when his father, the said Joseph, died, continued to live with and was supported by his mother until he became seventeen years of age, when he left home. He married at the age of nineteen and died in 1862, at the age of twenty-four, leaving a widow and one child, Flora G., who subsequently married one L. C. Jones.

At the February rules 1881, the said Flora G. Jones and her husband brought this suit in the circuit court of Preston county against the widow and children of said Joseph Pratt and the grantees and owners of said ninety acres of land. The plaintiffs allege in their bill that neither the female plaintiff nor her father ever parted with her interest in said land, that she as the sole heir of her deceased father is entitled to the one sixth part thereof; and the plaintiffs pray that said land may be partitioned and her one sixth assigned to her in severalty, &c.

The defendants, the said widow, Nancy Lemon, and the grantees of the land filed their several answers to the plaintiffs' bill which were replied to generally. The widow in her answer, after setting out the destitute and sad condition in which she was left with her six helpless children and the sales of the said twenty and twenty-three acres off the land, says, that she expended the whole of the purchase-money therefor in the support and for the benefit of her children; that, if she had not made said sales, she would have been com-

pelled to contract debts for the maintenance of her children, for the payment of which the whole of said tract would probably have been sacrificed; that the residue of the tract was sold to the defendant Snider about the year 1869, when all her living children were of age, except Joseph, and all except him joined in the deed and he relinquished his claim to Snider after he became of age without any further consideration; that said deed was so made and signed merely to satisfy Snider, respondent never having had any doubt that she had a right to convey the land herself; that under all the facts and circumstances the land was in all fairness her own; that but for her exertions and sacrifices it would have been lost; that having a deed for it duly recorded, looking only at the equity of the transaction and being ignorant of the rules of common law, she never doubted her exclusive dominion over the land and so spoke of it to those to whom she sold; that she thinks it would be very unjust to her vendees to disturb their title, for their purchases were in good faith for what was at the time a fair consideration and the proceeds of the sales were applied to the purchase of actual necessaries for herself and children including the father of the female plaintiff, who if now living would not in equity be entitled to any interest in said land, because after paying for said land there was no personal estate left with which to raise and educate her children; this she did by her own labor and the whole of said land would not have supported her children as she did in their helpless infancy, &c., &c.

The grantees and owners of said land aver that they were purchasers for value in good faith and without notice of any defect in the bill of their vendor. They insist that the claim of the plaintiffs, if any right of action ever existed therefor, has long since been lost by lapse of time and the bar of the statute of limitations, &c.

The cause, coming on to be heard on the pleadings, exhibits and depositions, the court by its decree of December 8, 1882, adjudged and decided that the female plaintiff was entitled to the undivided one-sixth of the twenty-three acres then claimed by and in the possession of the defendant David Albright and also in the forty-one acres then claimed by and in the possession of the defendant, Henry J. Snider, and appointed

commissioners, to lay off and assign to the said plaintiff her one sixth of said lands in severalty. From this decree the defendants, Albright and Snider have obtained this appeal.

I have thus fully and at length stated the facts and pleadings in this cause, because they more clearly demonstrate the inequitable and ungrateful character of the plaintiffs' demand than could be done in any other manner. The grandmother of the claimant here was left thirty years before the institution of this suit with six helpless children, one of whom was the father of the claimant then but thirteen years old, in an almost destitute condition, having but a small piece of land, then worth about $200.00, and her own labor upon which to raise and support herself and little children. Being by her utmost exertions unable to take care of her children and provide for them the bare necessaries of life, she was compelled from time to time to sell off small portions of this small piece of land as the only refuge from absolute want and suffering. The whole value of the interest of the father of the present claimant in the land at the time would not have exceeded $50.00, not more than sufficient to give him a scanty maintainance for a single year, yet he was supported by his mother for no other pecuniary consideration four years and as soon as he became of an age that he might be of some service to her he went away to act for himself and left her alone to care for and support his younger and still dependent brothers and sisters. Twenty-four years after he had thus left home and abandoned the land, and after all of it had passed into the hands of fair purchasers for value and the proceeds consumed to maintain the family, his daughter brings this suit charging the grandmother with misconduct and fraud and asking a court of equity to have her conveyances declared fraudulent and her vendees deprived of the consideration paid which had been received and enjoyed twenty-eight years before by her father. The mere statement of such a claim is the severest condemnation of its morality and equity.

If the grandmother had applied to a court of equity to have the land sold and the portion of the proceeds to which the claimant's father would have been entitled paid over to her for his maintainance during his minority, no one can doubt

that such disposition would have been made of it. This was in fact done, and as nothing was wanting but mere form to divest the title of the plaintiff's father, the Court now regarding the substance and not the form will ratify and validate what has been done and thus declare the claim of the plaintiff extinguished. *Maguire* v. *Doonan*, 24 W. Va., 507; *Rinker* v. *Striet*, 33 Grat. 663.

Thus much for the morality and equity of the plaintiffs' demand. But in strict accordance with the most technical rules of law and equity jurisprudence, the plaintiffs are entitled to no relief.

Admitting, as claimed by the plaintiffs, that the grandmother by the conveyance of the legal title to her in 1851, became merely a trustee holding the land for the use of her children, what is the result? It is clearly shown, that as early as the year 1855, she unequivocally and positively repudiated the trust by selling and conveying away a part of the land and placing the purchaser in possession. This conveyance was not made as trustee, for as such she could not convey, but it was made in her own right and in positive disregard and denial of the trust. At the time it was done, the father of the female plaintiff was seventeen years of age and living with his mother and must of necessity have been fully cognizant and informed of it. The sale as well as all the transactions connected with it were open and notorious; there was no concealment, the deed was put upon record and the purchaser placed in possession. The mother claimed the land as her own and there is not a particle of evidence in the record that she ever thereafter admitted or recognized any trust or right in her children. The doctrine is well settled, that while in cases of direct or express trusts, as between the trustee and *cestui que trust*, the statute of limitations has no application during the continuance and recognition of the trust, yet if the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold and control the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought

home to the *cestui que trust.* 2 Perry on Trusts, § § 863, 864; Ang. on Lim. § 174; *Nease* v. *Capehart*, 8 W. Va. 95; *Cooey* v. *Porter*, 22 *Id.* 120; *Bargamin* v. *Clarke*, 20 Grat. 544; *Rowe* v. *Bently*, 29 *Id.* 756, 760.

In regard to the statute of limitations, the rule is well settled, that unless there is an express saving in the statute, no person will come within its exceptions, and the limitations will operate against persons under disability as well as against others; and the express exceptions refer only to such disabilities as exist at the time the right of action first accrued; for while, if several disabilities exist together at that time, the statute will only begin to run at the cessation of the last of them, yet if a second disability occur after those then existing have ceased, it can not be pleaded, for it is the settled law, that if the statute has once begun to run, no subsequent event will interrupt it. 1 Bar. Ch'y Pr., § 34; Ang. on Lim. §§ 194, 197; *Parsons* v. *McCracken*, 9 Leigh 495; *Caperton* v. *Gregory*, 11 Grat. 505; 1 Rob. (new) Pr. 609.

When the repudiation of the alleged trust was brought to the knowledge of the father of the female plaintiff he was, as we have seen, seventeen years of age. He was then under the disability of infancy; and, while he might have then asserted his right against the claim of his mother, he was not obliged to do so until he became twenty-one years of age, and under the statute then in force he was allowed ten years from that time to bring his action but no longer. Sec. 3, ch. 149, Code of Virginia of 1849, p. 590.

When he arrived at his majority in 1859, the statute commenced to run, and he and the plaintiffs who claim under him became barred of any right of action in 1869, ten years thereafter. The statute having commenced to run against him, his subsequent death and the disabilities of his heir the plaintiff did not interrupt its operation. In 1869, when his right of action would have terminated had he lived, the right of action which through him devolved on the plaintiff also ceased. *Moores* v. *White*, 6 Johns. Ch'y 372; *Eager* v. *Com.*, 4 Mass. 182; 1 Rob. (new) Pr. 609.

The mistake which seems to have been made by the plaintiffs and the court below in this cause is, that they evidently regarded it as necessary to entitle an adverse claimant to

avail himself of the bar of the statute of limitations, that he should be ignorant of the defects of his own title and have no knowledge of the rights of those against whom he claims. Such is not the theory of the law of adverse possession. It is a hostile intention of the actual occupant to hold the land as his own, without reference to the validity or defects of his title, against every other person or title, although he may know that his title is bad and such other person has the true title. *Core* v. *Faupel*, 24 W. Va. 238; *Shanks* v. *Lancaster*, 5 Grat. 110; Tyler on Eject., &c., 872–3.

It was altogether immaterial, therefore, that the grandmother of the plaintiff or her grantees knew that her title was in its origin a mere trust, that while in law she had the legal title, in equity she was simply a trustee. This all became immaterial from the time she repudiated the trust and this fact became known to the plaintiff's father. From that time her possession became adverse—and her grantees are protected by her title notwithstanding they may have had full notice and knowledge of the irregular and tortious origin of her title. It was the repudiation of the trust and the continuous adverse holding, with the acquiescence of the plaintiff and those under whom she claims, that completed the title of the grandmother and barred the right of the plaintiffs.

For the reasons aforesaid the decree of the circuit court must be reversed and the plaintiff's bill dismissed, which is ordered accordingly.

REVERSED. DISMISSED.

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CHARLESTOWN.

SADDLER'S ADM'R *v.* KENNEDY'S ADM'R *et al.*

Submitted September 8, 1885.—Decided October 2, 1885.

1. A judgment against the personal representative of a decedent is not even *prima facie* evidence of the debt against the heirs of such decedent. And in a suit brought by the plaintiff in such judgment against the heirs to subject the real assets descended,

such judgment against the personal representative will not prevent the heirs from relying upon the statute of limitations as a bar to the original cause of action in such suit. (p. 640.)

2. Since the Code of 1849 of Virginia the real as well as the personal estate of the decedent is made assets for the payment of all classes of debts. While the personal estate is the primary fund for that purpose, the real estate is not only the secondary fund but it is equally liable with the personal fund for the payment of all debts. Therefore, since the adoption of said Code, there can be no right of substitution or subrogation against the real estate by creditors who have by reason of the bar of the statute of limitations lost their right to charge it directly, although they may have a subsisting judgment against the personal representative of the decedent and be thus entitled to charge the personal fund if any there be. (p. 641.)

The facts of the case are stated in the opinion of the Court:

White & Trapnell and *D. B. Lucas* for appellant.

J. W. Kennedy and *W. H. Travers* for appellee.

SNYDER, JUDGE:

Suit in equity commenced in 1878, in the circuit court of Jefferson county by N. S. White as administrator of Leonard Saddler, deceased, against the administrator and heirs of Andrew Kennedy, deceased, and others, to subject the real estate of which the said Kennedy died seized to the payment of a bond executed by Philip P. Dandridge as principal and the said Kennedy as surety to the plaintiff's intestate for $1,052.85, dated December 17, 1849, and payable twelve months after date. The cause was referred to a commissioner by whom the administration accounts of the administrator *de bonis non* of the estate of said Kennedy were settled, and by decree of October 31, 1878, the report of the commissioner was confirmed and the personal representative of said Kennedy ordered to pay to the plaintiff the said debt which was ascertained to be $2,285.03, as of that date. By subsequent proceedings, it was found that there was a small personal fund applicable to the payment of said debt, and the court by decree of April 13, 1880, directed said personal fund to be so applied and then ordered that unless the administrator or heirs of Kennedy should pay the residue of the plaintiff's debt within sixty days certain commissioners therein

appointed should sell the real estate of which Kennedy died seized to pay the same. Upon appeal by the heirs of Kennedy this Court, by its decree of December 15, 1883, reversed and set aside the said decrees of October 31, 1878 and April 13, 1880, and remanded the cause with leave to the plaintiff to amend his bill. 23 W. Va. 221.

Pursuant to the directions of this Court the plaintiff amended his bill in the circuit court, and exhibited with and made parts thereof two other suits then pending in that court, the one entitled *John Seldon, &c.* v. *John W. Kennedy et als.*, and the other *Robert Lucas* v. *Andrew Kennedy's Administrator et als.* The latter was a creditor's bill filed by the plaintiff on behalf of himself and all other creditors of the estate of Andrew Kennedy, deceased, against the administrator and heirs of said Kennedy. The former was a suit brought under the provisions of ch. 79 of the Code for the sale of the real estate of which Andrew Kennedy died seized, the bill alleging that the said real estate was not susceptible of partition, and praying that the same might be sold and the proceeds divided among the heirs of said Kennedy. In the bill in this latter suit which was filed in October, 1881, the plaintiffs aver, "that the only debt due by the estate of said Kennedy is a decree against his heirs in favor of said White administrator of Saddler rendered by this Court in October, 1878," and the prayer is, "that said farm be sold and the proceeds, after paying the debt to Saddler's administrator, be divided among those entitled thereto."

The infant defendants by guardian *ad litem* filed their answer to the bill in the present suit and the adult defendants filed thereto a formal plea of the statute of limitations. Then the plaintiff in 1884 filed a second amended bill in reply to said plea of the statute of limitations, in which he avers, that the said Andrew Kennedy died possessed of large personal estate, largely in excess of all of his indebtedness, including the plaintiff's demand; that his personal estate passed into the hands of his personal representative and was divided among the distributees and heirs of the said Kennedy, the defendants in this cause, and that by reason thereof the plaintiff's judgment at law has been unavailing; that said heirs having thus appropriated and enjoyed said personal

estate which in the hands of the administrator would have furnished a fund to satisfy the plaintiff's debt, a court of equity will subject to the payment of said debt the land which descended to said heirs, &c.

On February 25, 1885, the court entered a decree dismissing the plaintiff's bill with costs of which the following is the material portion: "This cause came on again to be heard upon the amended bill * * * the answer of the infant defendants, by &c., the plea of the statute of limitations filed by the adult defendants, and the plaintiffs demurrer thereto and joinder therein, the second amended bill filed by leave of the court at the November term, and the defendants' joint answer and general replication thereto, was argued by counsel. On consideration whereof, the court being of opinion that the statute of limitations does not cease to run in favor of the heirs of deceased Kennedy by reason of the action at law and judgment against the administrator, doth overrule said demurrer; being further of opinion, that the running of the said statute was not suspended by the reason of anything stated in the pleadings, doth sustain said plea as a good defence to the complainant's suit and dismisses the suit of the complainant; neither party desiring to present further evidence as to their issue joined."

At a subsequent term the plaintiff tendered and asked leave to file his bill of review to said decree, and on June 10, 1885, the court entered an order refusing permission to file said bill of review.

The plaintiff in his bill of review avers that so much of said decree of February 25, 1885, as states, that the cause was heard on "*the defendants' joint answer and general replication thereto*," was inadvertently stated in the decree, and that in fact no answer was filed to the amended bills by any of the adult defendants; and that no issue was joined on the pleadings in the cause. He therefore claims that in order to remove the ambiguous character of said decree which seemed to leave it doubtful whether the issue decided by the court was one of law exclusively or whether it was one of fact also, he was entitled to have said decree set aside for error apparent upon its face and leave given him to prove the facts alleged in his second amended bill if they should be denied upon a proper issue made by the pleadings.

Upon the petition of the plaintiff an appeal with *supersedeas* was allowed him from the said decrees of February 25, 1885, and June 10, 1885.

It is the settled law of this State, whatever may be the rule in other jurisdictions, that inasmuch as there is no privity between the personal representative and the heirs of a decedent, a judgment rendered against the former is not even *prima facie* evidence against the latter; that such judgment is not a lien on the real estate descended to the heir and does not prevent the statute of limitations from running in favor of the heir when the real estate descended is sought to be subjected for the debt on which such judgment was obtained. *Laidley* v. *Kline*, 8 W. Va. 218; *Custer* v. *Custer*, 17 *Id.* 113; *Bank* v. *Good*, 21 *Id.* 455.

The plaintiff in error attempts to escape the consequences of this rule upon the ground, that he having a valid and subsisting judgment against the administrator of the decedent, and the heirs as distributees of the estate, having received personal assets which if left in the hands of the administrator would have satisfied his debt, the administrator would have a right against them to marshal and recover these assets, and he as a creditor of the decedent is entitled to be subrogated to the rights of the administrator in a court of equity. In support of this position he relies on the cases of *Pugh* v. *Russell*, 27 Grat. 789; and *Brewis* v. *Lawson*, 76 Va. 36.

I do not think these cases sustain the claim of the appellant. *Pugh* v. *Russell* involved the rights of parties in regard to debts contracted prior to the Code of Virginia of 1849, and the court decided in that case that, "Before the Code of 1849, if a judgment recovered against an executor or administrator, upon the *bond* of the deceased *binding his heirs*, was paid out of the personal estate, simple contract creditors may be substituted to the right of such creditor against the heirs."

The simple contract creditors in that case had no right to the payment of their debts out of the real estate of the decedent; and the question decided was, that as the specialty creditors had their remedy either against the personal or the real assets, if they elected to take the former and thereby

exhausted them, then the simple contract creditors, according to principles well settled, had the right to resort to the real estate to the extent the personal assets had been applied to the payment of specialty debts.—2 Lomax on Executors 418–19.

By the Code of 1849, all the real estate of the decedent was made assets for the payment of his debts whether they were specialty or only simple contract debts—both classes were put upon the same footing. Such has been the law ever since and is now the law in this State.—Sec. 3, ch. 86, Code of 1868, p. 506.

While the personal estate is the primary fund for the payment of the debts of a decedent, the real estate is not only the secondary fund for that purpose, but it is equally liable with the personal fund. The only difference is that the personal fund must be first applied. *Suckley* v. *Rotchford*, 12 Grat. 60.

Under our present statute if the personalty has been exhausted in the payment of debts, wasted by the personal representative or appropriated by the heirs, the unpaid creditors may resort to the real assets descended to the heir as of right and not by way of substitution. The decision therefore in *Pugh* v. *Russell*, *supra*, has no application in cases arising since 1850.

It is, however, said in that case that "If at the time of the institution of his suit against the personal representative, the appellee was not barred of his action by limitation, neither is he barred by subsequent lapse of time, in proceeding against the heir to have the assets marshaled in his favor. If, therefore, the appellee makes good *his claim to subrogation* in this case, the appellants will be precluded from relying upon the bar of the statute," citing Adams' Eq. (May. p.) 275 and note; 27 Grat. 800.

In the other case *Brewis* v. *Lawson*, *supra*, the court on the authority of *Pugh* v. *Russell*, *supra*, says: "Assuming that such defence (the statute of limitations) by the heirs was admissable, the act ceased to run at the commencement of the action at law." 76 Va. 44.

If these Virginia cases can be considered as deciding that a judgment against the administrator will prevent the statute

of limitations from running against the heirs in a suit like the one now before us, in which it is sought to subject the real estate of the decedent to the debt on which such judgment against the administrator was obtained, then those decisions are in conflict with the decisions of this Court, on that question, and can not therefore be regarded by us. In *Laidley* v. *Kline*, *supra*, it is expressly held that: "The heirs of a decedent are entitled to the benefit of the statute of limitations as to the plaintiffs's claims set up in his bill, or any of them, so far as the time elapsed creates a bar to them or any of them. 8 W. Va. 230. The claims thus referred to were judgments recovered by the plaintiff against the administrator of the decedent. This is a positive authority that a judgment against the administrator does not prevent the statute from running in favor of the heir, and this decision has been followed in other cases by this Court. See the cases before cited.

In *Cralle* v. *Meem*, 8 Grat. 496, and *Williams* v. *Williams*, 11 *Id.* 95, relied on by the plaintiff in error, the question of the statute of limitations was not involved. Those cases simply decided that when the personal assets did not pay the debts of the decedent the creditors had a right to resort to the real estate descended for the satisfaction of their debts. The right to do so where such debts are not barred as to the heir is not controverted in this cause.

The admission made in the partition suit of *Seldon, &c.* v. *John W. Kennedy et als.* that a decree had been rendered in this suit, in 1878, for plaintiff's debt was merely a statement of what was the fact at that time. The said decree was, however, subsequently reversed and set aside by this Court. I am unable, therefore, to discover how that admission, if it may be regarded as such can estop the heirs of Kennedy from relying upon the statute in this cause after the reversal of that decree. The reversal destroyed the evidence upon which the admission was made and left the parties free to act as though no such decree or admission had ever been made.

It is claimed by the appellant that even if his debt was barred as to the heirs, he was entitled to an account of the assets which passed at the death of Andrew Kennedy into

the hands of his administratrix, and the bill should have been sustained for this purpose if for no other. The fault of this claim is that the bill avers the death of M. A. R. Kennedy the administratrix before the institution of this suit and her personal representative is not made a party to the amended bills. In the caption of the original bill, Anthony Kennedy is mentioned as the executor of M. A. R. Kennedy, but there is no averment that he is such or any reference to him or relief asked against him as such executior in the original or the amended bills. The personal representative of the administratrix was, therefore, not a party to the suit. But if this were all, it might be contended that the court instead of dismissing the bill should have given the plaintiff leave to amend it by making such personal representative a party. It appears from the proceedings had in the cause before the former appeal, that an account of the personal fund in the hands of the administrator *de bonis non* had been ordered, a report made thereof which was confirmed by the court and the whole of said fund applied to the plaintiff's debt, consequently there was no occasion for any further account against said administrator. In regard to the first administratrix the plaintiff in his second amended bill avers that the personal fund which came into her hands "was distributed and divided among the distributees and heirs at law of the said Andrew Kennedy, the defendants in this suit." There could, therefore, be no purpose in taking an account of her transactions in this cause unless the plaintiff had the right to charge the land descended to the heirs to the extent that the personal assets had been received and appropriated by them. This he had no right to do under our statute as hereinbefore determined.

It is not necessary to decide in this cause whether or not the plaintiff in a proper action or suit is entitled to compel the estate of the administratrix and her sureties to account for any fund which may have come to her hands applicable to the payment of the debt of his intestate, or whether if her estate and her sureties are made liable to the plaintiff, they can compel the distributees to whom such fund or any part of it may have been paid to reimburse them to the extent of such payment. It is certain from what has already been said

that the plaintiff is not entitled by way of substitution or subrogation to charge the real estate descended to the heirs in this suit. The plaintiff's demand being barred as to any right by him against the heirs or the real assets sought to be charged, the court did not err in sustaining the defence of the statute of limitations and dismissing the plaintiff's bill. The essential purpose of this suit was to charge the real assets in the hands of the heirs, and as that can not be attained, the incidental objects of the suit, if there were any, must share the fate of the substantial object and fall with it.

In the view I have taken of the questions involved in the cause, it has been unnecessary to determine whether or not any answer was filed or issues of fact presented. Assuming that the facts alleged in the plaintiff's second amended bill were true, he was not entitled to the relief prayed, and his bill of review was necessarily immaterial and unavailing.

For the reasons aforesaid the decrees of the circuit court must be affirmed.

AFFIRMED.

CHARLESTOWN.

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CARTER v. C. & O. RAILWAY CO.

Submitted September 14, 1885.—Decided October 2, 1885.

(SNYDER, JUDGE, Absent.)

1. A declaration in ejectment, which describes the premises as "a certain lot of land lying in the town of Ronceverte in the county aforesaid, being the piece of land near the railroad depot in said town, upon which the defendant has erected a pump-house and appliances for the purpose of supplying its engines with water," describes the premises with such convenient certainty as to make it good on demurrer. (p. 651.)

2. There is no doubt, that when an individual having title to lands lying on both sides of a water-course not navigable grants lands lying on one side thereof and bounded thereby, the grantee gets by such grant a moiety of the bed of the water-course, unless the grant clearly excludes such construction of it. (p. 653.)

3. But, where a grantor having title to lands lying on both sides of a head race of a mill owned by him below the land, which he grants, conveys to a grantee by a deed lands on the opposite sides of this mill-race bounded by it, the tracts on each side of the mill-race being described by metes and bounds extending around the whole of each tract separately and not extending around both of them together as one tract, the grantee gets no part of the bed of such mill-race. (p. 654.)

4. When a deed calls for a corner, which stands on the top of the bank of a stream not navigable, and the courses are up the line of said stream, though trees be marked or stakes planted along the top of the bank of such stream, the boundary of the tract would be the same, as if the deed had called for the water-edge of the stream at low-water mark as the boundary. (p. 655.)

5. But if in such a deed as above described there be substituted instead of a stream not navigable the head race of a mill owned by the grantor on this race below the land granted, the boundary of the tract granted would be the top of the bank of the mill-race along the line, on which trees have been marked or stakes planted and not the water edge of the mill-race at low-water mark. (p. 656.)

GREEN, JUDGE, furnishes the following statement of the case:

This was an action of ejectment brought by Emily C. Carter against the Chesapeake and Ohio Railroad Company in the circuit court of Greenbrier county in March, 1883, to recover the possession of the ground, on which stood a pump-house or engine-house, which had been erected by the company for supplying its engines with water. The description of the land in the declaration was: "A certain lot of land lying in the town of Ronceverte in the county aforesaid being the piece of land near the railroad depot in said town, upon which the said defendant has erected a pump-house and appliances for the purpose of supplying its engines with water." This declaration was demurred to by the defendant, on the ground that the premises claimed were not described in this declaration with convenient certainty, so that from such description possession thereof might be determined, as required by the statute-law. The court overruled this demurrer; and thereupon the defendant pleaded, that it is not guilty of unlawfully withholding the premises claimed by the plaintiff in her declaration and puts itself upon the country, and the

plaintiff did likewise, and issue was thereon joined. An order of survey was made and duly executed; and on November 20, 1883, the parties submitted the case to the court in lieu of a jury; and thereupon the court having heard the evidence found for the plaintiff all that portion of the land in the declaration mentioned, which lay between the top of the bank of the race to the plaintiff's mills and this mill-race, occupied by the pump-house or engine-house of the defendant, it being somewhat more than four-fifths of the ground, on which this pump or engine-house stood as shown by the map of the surveyor of the county returned to court under the order of survey, and that the plaintiff was entitled to this ground in fee. Whereupon the defendant moved the court for a new trial, which motion the court overruled and rendered judgment according to this finding of the court. To this ruling and judgment of the court the defendant excepted and took a bill of exceptions, in which all the evidence as well as the facts agreed by the parties was certified.

The matter in dispute between the parties, the evidence and facts agreed showed, was, who owned the land between the top of the bank of the mill-race leading to the plaintiff's mills and the edge of the water in this race? They both claimed a title derived from the same parties. The defendant under an agreement dated October 20, 1871, and a deed dated April 4, 1872; and the plaintiff under two deeds, one dated May 20, 1878, and the other July 15, 1881. These two last deeds taken together conveyed the whole of a large tract of land, on which was a grist and flour mill as well as a steam saw-mill, except that portion which had by the previous agreement and deed been sold to the defendant, and especially the whole of said mill-race including its banks and all the land immediately on the said race, which the last named deed declared had been excepted from the aforenamed deed to the Chesapeake and Ohio Railway Company. On the contrary the defendant claimed, that this agreement of October 20, 1871, among other things sold this strip of land between the edge of the water in the race and the top of the bank on the north side thereof, if not the land from the centre line of this mill-race, to the defendant, and that the deed of April 4, 1872, conveyed the same to the defendant. Claiming this

the defendant in April, 1880, erected a pump or engine-house for supplying water to the engines on its railroad. A little less than one-fifth of the ground, on which this engine or pump-house stood, was ground beyond the top of the bank of the mill-race, and a little more than four-fifths of the ground, on which it stood, was on the slope of the bank and between the top of the bank and the water's edge, that is, stood on ground claimed by the plaintiff. This pump-house was built down to the water's edge, the water in the race being then low; and at an ordinary stage of the water it extends into the water of the race about eighteen inches. When this pump-house was erected, there stood two trees at one corner of it and one tree at another corner close to the then edge of the water in the race.

One Weaver with the knowledge and consent of the grantor of the plaintiff at another place built an eating-house close to the top of the bank but altogether on the land, which had been admittedly sold by this grantor of the plaintiff to the Chesapeake and Ohio Railroad Company. But without the consent of the railroad company or of the grantor of the plaintiff Weaver built a small back kitchen below the top of the bank and therefore upon the ground now claimed by the plaintiff, and he still occupies this kitchen. This race lies between the town of Ronceverte and the north side of the Greenbrier river and what is known as the Big Island in this river. There had always been a gut or depression between the Big Island and the main head through which, before dams were put in the river, water would run only when the river was high and past fording; but at ordinary or low water there was a succession of pools in this gut. To make this gut available for a mill race, the owner of these lands, before the plaintiff or defendant had bought any of it, dug channels connecting the pools and dug a channel some two feet deep, where the river now flows into this race, and had frequently to dig away the gravel and other material, which would accumulate and form a bar at the head of the island and along the race, and this had still to be done to make the race available for the mills owned by plaintiff. Cecil Clay, the former owner of these lands, by his agreement with the Chesapeake and Ohio Railroad Com-

pany of date October 20, 1871, under which it claims the land in dispute between the top of the bank of the river and the edge of the water, sold to it first, fifty feet on each side of the railroad for the whole length of Clay's land; secondly, "all the lands lying within the following bounds: beginning at a point on the east side of third street west in said town as laid down on Hotchkiss's map, 145 feet north of the centre line of the railroad; thence with the east line of third street west *to the edge of the mill-race:* thence with the north side of the mill-race and river to a point 400 feet east of the east line of seventh street east of said town; thence by certain lines not necessary to be named to the beginning; third, all the upper or Big Island, except three acres described on the lower point of the island and small part of the upper end of it. Clay reserving a right to cultivate this island till it was put to use by the railroad company, and no interference was to be made by the railroad company with the mill and boom-race that will impede the flow of water or floating of logs. This property was to be used by the railroad company only for depots and houses for railroad hands. The company was to connect its main track by a track with Clay's saw-mill. This agreement was carried out with certain additions by the deed of April 4, 1872, which thus described the lands conveyed named as the second parcel in this contract:

"A tract or parcel containing by recent survey satisfactory to the parties 25 75-100 acres situate on the line of the Chesapeake and Ohio Railroad between station 763-50 and station 792-50 and adjoining the village of Ronceverte recently laid out on Clay's land."

A map showing the lands conveyed was attached as a part of the deed. By this deed there was also granted to the Chesapeake and Ohio Railway Company the right to use the water of a small stream, which runs through Clay's land and this village of Ronceverte, to supply all buildings placed by the railway company on the land conveyed to it by that deed and for all other railroad purposes. There were then added seven stipulations and agreements, which the railway company was to comply with as the consideration to be given for this deed. The fifth of these stipulations was: "That the railroad would be so constructed and operated as not to inter-

fere with said Clay's mill and boom race so as to impede the flow of water or the floating of logs." The map referred to in this deed gives the courses and distances of the parcels of land conveyed by the deed. The following is the description of the parcel of land containing 25 75-100 acres as given on this map: "Beginning at a point on the east side of third street 145 feet north of station 792-50, thence S. 26° 15′ E. 533 feet to edge of race, thence N. 28° 45 E. 297 feet, thence N. 52 E. 187 feet;" then follow twenty other courses calling for no natural objects, except that two of the courses are parallel with the courses of the Chesapeake and Ohio Railroad. The part of the island conveyed contained twenty-seven acres and lay on the south side of this race as the above tract lay on the north side of it. Like the description of the above tract it contains many courses and distances but no natural objects are called for, except one course and distance is said to be "552 feet to the river," though consisting as it did of this island with the exception of two very small portions; one at the upper extremity of the island and the other at the lower extremity. It was really bounded on the south side by the Greenbrier River, and on the northern side by this mill-race or the top of the bank of this mill-race, one or the other according to the contention of the parties in this case. The parcel of 25 75-100 acres of land, so far as it bordered on this mill-race, was surveyed in this case under the order of survey; and the survey was commenced at a point called on the map A., which was proven to be the termination of the first line of the survey, as set out in the plat, which was made a part of the deed from Clay to the railroad company, dated April 4, 1872. This first course was, "beginning at a point on the east side of third street in said town 145 feet north of station 792-50 of railroad and thence S. 26° 15 E. 533 feet to edge of race." There would seem to have been no real difficulty in locating this point A. from these provisions in the deed to the defendant. This point A was found to be just under the turn of the top of the bank on the race side and about what would be considered the high water-mark of the water in the race, but was forty-two feet from the edge of the water in the race, when this survey was made. Running the other course of this tract, as laid down in the deed to the defendant, it was

found, that the first course from the point A., instead of running up the race on the top of its bank crossed this race just touching the sides of it on the south side and then recrossed it and terminated just on the top of the bank on the northern or main land which was thirteen feet then from the edge of the water in the race at the state it was when this survey was made. The two next courses ran along the top of this bank of this race and terminated also on the top of the bank at a point forty feet from the edge of the water as it then stood in the race. The other courses, the whole number being eight, went further from the race than the top of the bank, their utmost distance from the top of this bank judging from the map returned by the surveyor being about sixty feet. The general course of these lines however corresponded pretty well with the various turns in the race though not very accurately.

At the instance of the plaintiff the surveyor ran the courses and distances along the top of the bank of the race, which she claimed was the true boundary of the tract of 25 75–100 acres. The beginning point was the point A. on the top of this bank forty-two feet from the edge of the water in the race at its height, when this survey was made, but really at the high water mark. The top of this bank at the first station was fourteen feet from the edge of the water, at second station thirteen feet, at third station twenty-three feet, at fourth station forty feet, at fifth station eighty-five feet, at sixth station sixty-four feet, at seventh station forty-five feet; the eighth station was at the Weaver-house the kitchen of which was found to be between the top of the bank and the water in the race, while the house itself was altogether beyond the top of this bank; the ninth station was ten feet from the water's edge, the station being on the top of this bank; the tenth station was eleven and one-half feet from water's edge, the eleventh station fifteen feet, the twelfth station thirty-one feet; the thirteenth station was at a point claimed by plaintiff to have been an original corner on top of the bank, and the fourteenth station on top of bank was thirty-eight feet from water's edge. It will thus be seen that the top of the bank differed much at different points from the low water mark. This great diversity of its distances from

low-water mark was doubtless attributable to this race not having been altogether dug out but being a natural gut, through which the river ran wider in some places than in others, and which had been simply deepened and converted into a race.

In the running of this line along the top of the bank of this race it was found, that the pump or engine-house, the subject of controversy in this suit, was run through by the line between stations nine and ten. Of the ground, on which this pump or engine-house stood, three feet was beyond the top of this bank and therefore not on the land claimed by the plaintiff, while thirteen feet of it was on ground between the top of the bank and the water of the race and was therefore on the ground claimed by the plaintiff. The map filed with the deed to the defendant as well as the survey, by which the town of Ronceverte was then laid out and mapped were made by one Hotchkiss; and it was proven, that in 1872 there was a succession of stakes along the top of the bank of the race, fifty feet apart, and that there were similar stakes all over Ronceverte to indicate lines and corners of lots and streets, and that they were always called the Hotchkiss stakes; and that two of these stakes were still at the time of this trial standing on the top of the bank and on the line now claimed by the plaintiff as the boundary of this tract of 25 75–100 acres. Moreover the people of the town recognize them as land-marks of the Hotchkiss survey. These were all the facts proven in the case, which I regard as material.

J. H. Ferguson for plaintiff in error.

J. W. Harris for defendant in error.

GREEN, JUDGE:

The first enquiry in this case is: Did the court below err in overruling the demurrer to the declaration? The only supposed defect in the declaration was, that the premises, the possession of which is claimed by the plaintiff, were not "described in the declaration with convenient certainty, so that from such description possession thereof may be delivered," as required by the Code, ch. 90, sec. 8. If the descrip-

tion had been "a certain lot of land lying in the town of Ronceverte in the county aforesaid, upon which the said defendant has erected a pump-house and appurtenances for the purpose of supplying its engines with water." Such description would have meant not merely the ground, upon which the pump-house stood, but a lot of ground, on which this pump-house had been built, and might of course have included more ground than that, on which the pump-house stood, though if the pump-house covered the whole lot of ground, then of course it would only have meant the ground, on which the pump-house actually stood; but what is meant by the description of the premises claimed is made definite by the following explanatory words in the declaration: "being a piece of land near the railroad depot in said town, upon which the defendant has erected a pump-house." This shows with convenient certainty, that the plaintiff sought to recover not a lot of land in the usual sense of the word but "a piece of land on which stood this pump-house," the ground actually covered by this pump-house. With these explanatory words in the declaration, it seems to me, the sheriff could have no difficulty in delivering the possession of the premises which is all the certainty required in describing property in a declaration. In ejectment the court therefore did not err in this demurrer. It was certainly badly worded, so far as the overruling description of the premises claimed was concerned; yet it seems to me the property was described with convenient certainty within the meaning of our statute. It was described with much more certainty than in the case of *Hitchcock* v. *Rawson*, 14 Grat. 538, where the declaration was held fatally defective on demurrer.

The only other enquiry to be made is: Did the circuit court err in finding for the plaintiff and entering the judgment for her upon the evidence, which all appears in the record? This depends entirely upon whether the true boundary of the tract of land conveyed by the deed of April 4, 1872, to the Chesapeake and Ohio Railroad Company was bounded by the top of the bank of the race or gut, as claimed by the plaintiff, or extended, as claimed by the defendant, to either the low-water-mark of the race or to the center of the race. That it did not extend to the center of the race is to

me clear on the face of the deed and is made still clearer by the evidence. The deed on its face conveys two tracts of land, one on the north side of this race containing 25 75–100 acres of land and the other containing 27 acres on the south side. The map, which was made a part of this deed, shows, that these two tracts of land lay immediately opposite each other. If this tract of 25 75–100 acres extended to the center of the race, the tract of 27 acres also extended to the center of the race, and the two tracts bordered on each other and really constituted but a single tract, which, as the map shows, could readily have been laid off together and surveyed as a single tract. If the whole of the race was intended by the parties to be conveyed to the Chesapeake and Ohio Railroad Company it would be impossible to assign a reason why these two tracts, which would then have been but a single tract, were not conveyed in this deed as a single tract, thus avoiding the entirely useless setting out of the courses of the race on both sides of it. It is perfectly obvious, that the parties to this deed certainly intended to leave unconveyed to the Railroad Company this race either to its banks on one or both sides or to the water's edge, at least in low-water. In fact, if we look at the circumstances, which surrounded the parties, when this deed was made, it would amount to an absurdity to so construe this deed as to make it convey the whole of this race to the Chesapeake and Ohio Railroad Company. The grantors owned a dam across the Greenbrier above, made to throw water into this race, and two valuable mills below the lands conveyed by this deed situated upon this race, and it was frequently necessary for him to dig out and remove the filling up of this race, in order to use the mills. Under such circumstances we can not conceive, that he would convey away the mill race so long as he owned the mills. Other evidence might be referred to, which shows beyond controversy, that this was not his intention; but what I have said is certainly sufficient to show, that he never did by this deed intend to convey to the defendant the whole of the race.

The plaintiff in error cites *Camden and Karnes* v. *Creel*, 4 W. Va. p. 366, where the Court say: "There can be no doubt where an individual having title to lands lying on both sides of a water course grants the lands lying on one side

thereof and bounded thereby, that the grantee gets by such grant a moiety of the land of the water-course, unless the grant clearly excludes such construction of it. *Hayes* v. *Bowman*, 1 Rand. 417; *Mead* v. *Haynes*, 3 Rand. 33; *Crenshaw* v. *The Slate River Co.*, 6 Rand. 245; *Buckley* v. *Blackwell*, 10 Ohio R. 508; *Hopkins* v. *Kent*, 9 Ohio R. 13." This is unquestionably true; but this law has obviously no application to this case. The reason, upon which this law is based, is, that as the portion of the stream adjoining the grantee's land is necessary for his enjoyment of the land, and as such portion of the stream is of no value to the grantor, the owner of the land, on the opposite side of the stream, it must be presumed he intended by granting the land on one side of such stream to grant the portion of the stream adjoining the land conveyed to the grantee, and the law can fix no line between them except the middle of such stream. Cowen, judge, in *Starr* v. *Child*, 20 Wend. 153, says: "Surely it would be absurd for the law to give a man to the shore or side of a fresh-water river, and yet by saving the bed to the grantor make the owner of the land a trespasser, every time he should slake his thirst or wash his hands in the stream." But in the case of an artificial race used by the grantor in connection with his mill below the lands granted the absurdity would be, that the law held, that by granting lands on both sides of his mill-race as two separate tracts in one deed each bounded by opposite sides of the mill-race he granted the entire bed of the race to the grantee and thus the grantor would become a trespasser, if he undertook to clean out this mill-race or to deepen it, though one or the other might be absolutely necessary, in order that he might have any beneficial use of his mill situated on this race below. There can be no question therefore that the Chesapeake and Ohio Railway Company did not acquire the land to the middle of this race by this deed of April 4, 1872.

The next enquiry is: Did this tract of land of 25 75–100 acres conveyed by this deed to the defendant include the land down to the ordinary or low-water mark of this race? This much, it is insisted, was conveyed by this deed. In the first place in construing this deed we have a right to look to the wording of the contract between the parties of date of Octo-

ber 21, 1871, whereby this land was sold, and which provided for the execution of this deed. This is a necessary deduction from the decision in *French v. Bankhead*, 11 Grat. 36. Indeed independent of any authority it would seem unquestionable, as the deed was but the carrying out of the written contract between the parties. This tract according to the words of the contract is to run "to the edge of the mill-race thence with the north line of the mill-race and river 400 feet, &c;" and the map made a part of the deed describes a line as running to the "edge of the race," and thence by certain courses and distances, which, though they do not accurately conform to the mill-race, yet do make bends corresponding in a general manner with the bends in the race. These courses were obviously intended to run "with the north line of the mill-race" as called for in the contract. If the facts set out in the statement of this case be taken in connection with what appears on the face of the deed, do the words, "edge of the race and running up it along its northern line" mean up the line, which marked the edge of the water at ordinary or low water mark, or did it mean commencing at the point on the top of the bank of this race marked A. on the map and running along the top of the bank, where stakes were placed originally in running off this land to make the deed? We have been referred to a number of cases both by the counsel for the plaintiff in error and by the counsel for the defendant in error, in which upon various points of wordings in deeds questions have been raised and decided, as to whether a deed conveying land on a street or highway or on a stream carried the boundaries of the tract to the edge of the street, highway or stream, or to the centre of the street, highway or stream.

Many cases of this kind are cited in a note to *Salter* v. *Jonas*, 10 Broom 469, as reported in 16 Am. R., 233, and a number of them are relied upon by each of the counsel of the parties in this case. But it does seem to me that these cases and others like them really throw very little light upon the question before us. But there are cases, from which it may, I think, be fairly deduced, that, if the calls of a deed were to the edge of a river, which was not navigable, and thence with the northern line of such river the low-water of such river would be the boundary of such tract. Thus

in *McCullock's Lessee* v. *Alton*, 2 Ohio 307, it was decided, that, when a deed calls for a corner standing on the bank of a creek, "thence down said creek with the several meanders thereof," the boundary is the water's edge at low-water mark. The court say on p. 311: "The fact, that the marked corner called for stands four rods from the water, does not create any ambiguity in the terms 'down the creek with the several meanders thereof.' They import the water-edge, at low water, which is a decided natural boundary, and must control a call for corner trees or stakes upon the bank." In *Starr* v. *Child*, 20 Wend. 156, the court assigns a very strong reason for this decision. Referring to this and other cases the court say: "These cases show, what it is very difficult for the human mind to resist, that the parties never mean to leave a narrow strip between the land and the river, merely because some stake or tree, or even all the stakes and trees of the line stand a slight distance from the river. The expression of an intent to run the line along the stream, makes a distinct natural monument, which overcomes the others. They are rather intended to indicate a point down to the *terminí* of the water line."

If therefore this race was a natural unnavigable river the fact in proof, that the stake, at which the courses upon it began, stood forty-three feet from the low water mark of the stream, would not prevent the low water mark of the stream being the boundary of this tract, though other stakes had been planted in the survey along the bank of this stream and all of them some distance from this low water mark.

It remains now to determine, whether it will be otherwise in the case before us, in which the lines are up the race on the boundary of the deed instead of lines up a natural stream, where as in this case the race is the head-race of mills of the grantor located below the land granted. It is obvious that the principle reason for running of lines not on the bank of the natural stream, as the words of the deed would seem to direct, but running them along the line of the low water mark of the stream have no application to the case of such an artificial mill-race, as I have supposed, and as exists in this case. This is, that in the case of the natural stream the parties to the deed never could have meant to leave a

narrow slip between the land granted and the river, for the obvious reason that such narrow slip could not be of any value to the grantor in the deed, while it would be very convenient to the grantee. But this reason is utterly inapplicable to the case I have supposed or to the actual case before us. For in this latter case this narrow slip between the top of the bank of the race and the low water mark of the race so far from being of no value to the grantor is of very great value to him, as he could not have the full enjoyment of the mills owned by him below, unless he owned this slip of land between the low water and the top of the bank. This being the case, there is no just reason why the words of the deed should be disregarded as well as the stakes set up by the parties on the top of the bank, and the land granted be extended down to the low water mark in violation of the terms of the deed and to the injury of the grantor in the deed.

In the case before us this would be still more clearly unjustifiable, as, while this slip of ground between low-water mark and the top of the bank of the mill-race is necessary for the grantor, in order that he may conveniently clean out from time to time his mill-race and have the full command of it in high or low water for floating logs upon it to his sawmill and for all other purposes, it does not appear to have been regarded, when the deed was made, as of any importance to the grantee, the Chesapeake and Ohio Railway Company, and they could only use it to get water from the mill-race for their engines and for other purposes; and they accordingly put it to no use and took no possession of any part of this strip for some eight years after the deed was made; that the parties to this deed did not contemplate any such use of the water of the mill-race under this deed, is, it seems to me, shown by the face of the deed; for there is in the deed the following clause:

"No. 4. The said parties of the first part also grant to the said Chesapeake and Ohio Railway Company the right to use the water of a small stream which runs from the lands of said Clay through the said village of "Ronceverte," near Centre street, for all railroad purposes, including the supply of all depots, stations and other buildings or structures erected upon lots No. 2 and No. 3. For this purpose the said

company may collect the said water at any point upon said stream into a suitable reservoir or tank from which it may be distributed in pipes for the uses of said company who, for the construction, maintenance and repair of all such reservoirs, tanks or pipes shall have the right to enter upon the lands of the said parties of the first part, and of all claiming under them. If after supplying all the wants of the railroad company, there remains any water of the said stream which may be availed of by the said parties of the first part or those claiming under them, without interference with the supply of the railroad company, the right to such use is hereby expressly reserved."

This shows that the Chesapeake and Ohio Railway Company provided in this deed for the use of the water of this run for the purposes, for which this pump or engine-house is now being used as well as for *all other railroad purposes*, and that the parties believed, that this run would furnish more than a sufficient supply of water for all such purposes. The clause in the deed " that the railroad shall be so constructed as not to interfere with said Clay's mill and boom-race, so as not to impede the flow of water or the floating of logs," it is insisted, shows, that the construction, which I have put on this deed, is not the one contemplated by the parties, when the deed was made, as under this construction this clause would have been useless. But in fact this *clause* would have been useless, even if this deed bore the construction placed upon it by the counsel for the plaintiff in error, and the land of the company extended to low-water mark. The truth is, that this clause was inserted merely from abundant caution. Probably it was thought advisable, because in constructing bridges across this race to connect the two parcels of land conveyed to the company the bridges might be so constructed as to impede the floating of logs in the race. This provision clearly shows however, that the grantor considered he had rights in this race, which with unnecessary caution he endeavored to protect. The building of the eating-house, the kitchen of which is according to my construction of this deed on the land of the plaintiff, is regarded by counsel for plaintiff in error as evincing, that the parties construed this deed differently from what I have construed it, but as the evidence

shows this kitchen was built on this strip of land without the consent of either the plaintiff or defendant deprives it of all importance. The grantor in this deed, the evidence shows, was merely consulted about the building and location of this eating-house, in order that he might see that it did not interfere with his rights; and this he did by seeing that this eating-house was built on the land of the Chesapeake and Ohio Railway company exclusively.

For these reasons I am of opinion, that the judgment of the circuit court should be affirmed, and that the defendant in error should recover of the plaintiff in error her costs in this Court expended and thirty dollars damages.

AFFIRMED.

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CHARLESTOWN.

JOHNSON *v.* MCCLUNG.

Submitted January 31, 1885.—Decided October 2, 1885.

(*SNYDER, JUDGE, Absent.)

1. Where a case was tried and a verdict rendered, which was set aside by the court, and a new trial granted, and on the second trial the verdict was for the other party, and judgment rendered thereon, to which a writ of error has been obtained, the appellate court will look to the proceedings on both trials and, if the court below erred in setting aside the first verdict, will without considering the subsequent proceedings in the cause reverse the judgment and enter final judgment on the first verdict. (p 661.)

2. Sec. 2, of ch. 71 of the Code means, as if written as follows, including the words in parenthesis: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or (if a covenant or promise is made for the sole benefit of a person) with whom it is made jointly with others, such person may maintain in his own name any action thereon," &c. (671.)

The opinion of the Court contains a statement of the facts of the case.

G. A. Blakemore for plaintiff in error.

W. H. H. Flick and *W. F. Dyer* for defendant in error.

*Counsel below.

JOHNSON, PRESIDENT:

Johnson brought his action of covenant in 1875 in the county court of Pendleton county against D. G. McClung, survivor of himself, James B. Anderson, Philip Phares, jr., and D. C. Anderson, describing themselves as partners under the firm name of D. C. Anderson & Co. The writing declared upon provides as follows:

"This agreement made August 22, 1864, between David C. Anderson and Philip Phares, jr., partners under the name and style of D. C. Anderson & Co. and David G. McClung and James B. Anderson: First—Witnesseth, that the said D. C. Anderson & Co. have this day sold to D. G. McClung and J. B. Anderson one half interest in all the machinery, equipments and press at the Belfont Woolen Factory for the sum of $7,500.00. Second—D. G. McClung and J. B. Anderson hereby assume one half the indebtedness for the power, spinner, looms and other machinery purchased by D. C. Anderson & Co. for the sum of $700.00 in specie of Mr. David Johnson," &c.

It is not necessary to set out more of the contract specifically. The third clause provides, that the name of the new firm shall be the same as the old; the fourth, that the stock of woolen cloth and warp on hand shall be taken by the new firm at cost; the fifth, that each partner is to contribute his undivided service. It is signed and sealed by Philip Phares, jr., D. C. Anderson, D. G. McClung and J. B. Anderson.

The declaration alleges, that the covenant required the sum of $350.00 to be paid to the plaintiff, and for breach declares, that defendants did not pay the same to "the plaintiff, or to the said Philip Phares, jr., and D. C. Anderson, or to either of them," &c. The defendants pleaded covenants performed. This plea was entered November 13, 1875. The plaintiff replied generally to the plea. On May 11, 1876, the defendant filed a plea, that before the beginning of the suit he had paid the said sum of money described to Philip Phares, jr. and D. C. Anderson, and filed offsets, to the filing of which plea and offsets the plaintiff objected, which objection was overruled. Another plea was filed, that defendant did not covenant to pay the plaintiff, but his covenant was with Philip Phares, jr. and D. C. Anderson. The defendant

replied generally to this plea, &c. The case was tried by a jury March 13, 1877, and a verdict was rendered for the plaintiff for $617.78. On motion of defendant the verdict was set aside "for reasons appearing to the court;" and a new trial was granted, to which ruling of the court the plaintiff excepted, and asked the court to certify the facts, which was done.

The plaintiff filed with the judge of the circuit court of Pendleton county a petition for a writ of error and *supersedeas*, which was on April 28, 1877, by said judge refused. He then presented a petition to one of the Judges of this Court for a writ of error and *supersedeas*, which was on July 14, 1877, granted.

At a circuit court for said Pendleton county held October 28, 1879, the court dismissed said writ of error and *supersedeas* as improvidently allowed. On November 12, 1879, by consent the case was removed into the circuit court. On June 22, 1881, the case was again tried by a jury and a verdict rendered for the defendant, and the court entered judgment thereon. The plaintiff obtained a writ of error and *supersedeas*.

It is wholly immaterial now to enquire whether the circuit court erred in dismissing the writ of error, as the question is now properly before this Court, whether the county court erred in setting aside the verdict which was for the plaintiff. It is well settled, that, where a case is tried and a verdict is rendered, which is set aside by the court, and a new trial is granted, and on the second trial the verdict is for the other party, and judgment is rendered thereon, to which a writ of error is obtained, the appellate court will look to the proceedings on both trials, and if the court below erred in setting aside the first verdict, the appellate court without considering the subsequent proceedings in the case will reverse the judgment and enter final judgment on the first verdict. *Pleasants* v. *Clements*, 2 Leigh 474; *Knox* v. *Garland*, 2 Call. 241; *Briscoe* v. *Clark*, 1 Rand. 213; *Tyler* v. *Taylor*, 21 Grat. 700.

Did the plaintiff show a cause of action in his declaration? Could he sue upon the covenant, of which *profert* was made, and which was set forth in his declaration? It seems to have been well settled, that no action can be maintained

upon a deed *inter partes* by one not a party to the deed; that the right to sue on a covenant was limited to the parties to the deed or their privies. (*Barford* v. *Stucky*, 2 B. & B. 333, 6 Eng. C. L. R. 139; *Berkley* v. *Hardy*, 5 B. & C. 355, 11 E. C. L. R. 251; *Southhampton & Drummond* v. *Brown*, 6 B. & C. 718, 13 E. C. L. R. 303; *Ross* v. *Milne*, 12 Leigh 204; *Jones* v. *Thomas*, 21 Grat. 96.)

In *Barford* v. *Stucky*, the action of debt was brought by John Barford, administrator of Martha Elizabeth Pitts, against Vincent Stucky on an annuity-deed between Barnaby, John Bartlett and the defendant of the one part and Nathaniel Pitts of the other part. By this deed, which was set out on *oyer*, after a recital containing statements, which were immaterial to the decision, Barnaby, John Bartlett and the defendant did severally and respectively agree with Nathaniel Pitts, his executors and administrators, that they, Barnaby, John Bartlett and the defendant, would during a term of twenty-one years, to commence March 25, 1810, in case they or the survivor of them should so long live, pay or cause to be paid to Nathaniel Pitts, or in case of his death within the term to the use of his child or children, if any, in such proportions as Nathaniel Pitts should by deed or will appoint, or in default of appointment to all of them equally, and, if there should be no child, to his then wife, if she should remain his widow, an annuity of £500 by half yearly payments. Averments that Nathaniel Pitts died within the term intestate and without making any appointment; that Martha Elizabeth Pitts, his only child, afterwards died within the term intestate and without making any appointment; and that the wife of Nathaniel Pitts also died within the term in the lifetime of Nathaniel Pitts; that the plaintiff took out administration of the effects of Martha Elizabeth Pitts, and that three half-yearly payments of the annuity were in arrear. There was a general demurrer to the declaration. Dallas, C. J., said:

"It seems to me this action can not be maintained by the administrator of Martha Elizabeth Pitts, because she was no party to the contract, which makes it necessary to see between whom the contract really was. It was a contract between Barnaby, John Bartlett and the defendant of one part, and Nathaniel Pitts of the other part; and the daughter was

in no respect privy or party thereto, though in a certain event she would take a beneficial interest. To the contract therefore we must look, in order to ascertain the rights of the parties and it is a general principle, that the right to sue under a contract is confined to the parties to the deed. Now Martha Elizabeth Pitts was no party to this deed. The consideration did not move from her but her father, and the obligation arises out of the contract itself. It is admitted that an action might have been brought by the administrator of Nathaniel Pitts; if he had recovered, he would have been a trustee for Martha Elizabeth Pitts; and if he had refused to sue he might have been compelled by a court of equity to lend his name."

The judges all concurred.

In *Berkley* v. *Hardy*, *supra*, the action was covenant upon an indenture between "A. for and on behalf of B. on the one part, and C. on the other part." A. being thereto authorized by writing under B.'s hand, but not under seal, and A. executed the deed in his own name." Held that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B."

In *Southampton & Drummond*, v. *Brown*, *supra*, "where by an indenture between A. and B. of the first part, C. of the second part, and D. of the third part, A. and B. did, with the assent of C. devise to D. for years, yielding and paying a certain rent to E. and the heirs of his body, and D. covenanted with A. and B. and E. to pay the rent and to repair, &c. Held, that E. could not join with A. and B. in an action of covenant against D. for non-payment of rent, and not repairing."

In the case of *Ross* v. *Milne and wife*, 12 Leigh 204, the action was debt by Milne and wife against Ross for £500 sterling. The indenture sued on is thus described in the declaration: "For that whereas in the lifetime of a certain Janet Smith, the mother of the said Jane Milne, to-wit on September 7, 1816 at London in Great Britain, to-wit, at, &c., by a certain indenture then and there made between the said Janet Smith of the one part, and the said James Ross of the other part, and sealed with the seals of the said Janet and James (which said indenture bearing date the same day and year aforesaid, is in the possession of the said James

by reason of which the plaintiffs are unable to make *profert* thereof) the said James for the consideration therein mentioned did among other things, agree and oblige himself to pay to the said Jane Milne, her executors, &c., the said sum £500 sterling, within two calander months next after the decease of the said Janet; and the said A. Milne and Jane Milne his wife, aver, that on March 18, in the year 1832, at &c. the said Janet, departed this life, whereof afterwards to-wit on the same day and year last aforesaid at &c., the said James had notice; and since the decease of the said Janet as aforesaid more than two calander months have long ago elapsed whereby action hath accrued," &c. The court of appeals held the action could not be maintained. Tucker, president for the court, said:

"To this indenture between Janet Smith and the defendant Mrs. Milne is *no party* and therefore on well established principles, she can not sue upon it at law. Whether such a trust or interest is created for her benefit, as will enable her to sue in equity, it is not necessary in this case to enquire. It is sufficient she can not sue at law. The right to sue under an indenture *inter partes* is confined to the parties to it." After a review of the authorities, the judge says: "Upon the whole therefore I am of opinion that Mrs. Milne had no rights under this supposed contract. But it she had I am still of opinion that they could only be enforced in a court of equity. For it is not perceived that Mrs. Smith's representative has any concern or interest in the matter; he represents her with whom the contract was made by Ross, and from whom the consideration moved. Accordingly in one case where the right of the beneficiary to sue was sustained, the right of the promissee to sue was also admitted. *Bell* v. *Chaplain*, Hard. 321. But this leads to one of two consequences, either that the recovery here would not be a bar to the suit of the representative of Mrs. Smith, or it would be a bar. If it would not be a bar, then the defendant would be twice charged; if it would be a bar, then the representative of the promissee would be concluded by a proceeding to which he is no party. If then Mrs. Milne has rights, it is safest that they be asserted in equity, where all the parties can be convened; or that at least the suit should be brought in the

name of Mrs. Smith's administrator, that by being a party upon the record any controversy between him and Mrs. Milne as to her rights may be collaterally decided by the usual proceedings in similar cases."

Tucker, president, in this case reviews many authorities, among which are the following, of which we will give the substance. In *Fulton* v. *Dickinson*, 10 Mass. 287, a father bound his son to a trade, and the master agreed in consideration of his services to pay him a certain sum at full age. The son served out his time, and at maturity brought and maintained the action. His services were the consideration; and as it moved *from him*, and the promise to the father was *for him* he being a minor, it was in effect a promise to himself. After his review of a number of authorities, he says:

"All the other authorities, which have been reviewed or referred to at the bar, in which the action by a third party has been sustained, will be found, I think, to be cases in which a valuable consideration moved *from* him, or the money was directed to be paid over in discharge of a debt due him. Such was the case of *Ward* v. *Evans*, 2d Ld. Raym. 928; *Israel* v. *Douglass*, 1 H. Black, 239; *Weston* v. *Barker*, 12 Johns. 276, in which last, however, Spencer dissented in a strong opinion. The whole of this case depends upon these legal principles: that *choses in action* are not assignable; and that no executory contract has any force unless sustained by a valuable consideration. The first is a rule of law adopted for the prevention of maintenance; and though it has in modern times been somewhat relaxed, it is still a ruling principle. It was early admitted that an assignment for value was good in equity; and the assignee is now also permitted to sue at law in the name of the assignor, but he cannot sue in his own name. Nor can the assignee sue at law or in equity, unless he is an assignee for value, as has been already shown. The second principle is universal. No executory contract has any force, unless it be for value; and moreover wherever a valuable consideration is essential to an agreement, the legal interest in the simple contract resides with the party from whom the consideration moves notwithstanding it may enure for another's benefit, or even is to be performed to another person."

In *Hall* v. *Maston*, 17 Mass. 574 it was held, that where A. was the debtor of B. in the sum of $1,300.00 and also of C. in the sum of $400.00 and being abroad remitted to B. a bill of exchange for $1,000.00 with directions when the amount should be received to pay C. $200.00, and B. received the payment of the bill at maturity but neglected to pay C. as directed and gave him no return of the remittance, B. was liable to C. for the $200.00, in an action for money had and received to his use. And in *Arnold* v. *Lyman*, 17 Mass. 400 the action was *assumpsit*, founded upon an agreement subscribed by the defendant as follows:

"Whereas, Hezekiah Hutchens hath this day assigned, transferred, made over and sold to me certain notes, accounts, demands, goods, wares and merchandise, as per invoice and schedule arranged with full authority to collect, receive and make sale of them to my own use; now therefore in consideration of the premises, I do hereby promise and engage, to assume and pay the following demands against the said *Hutchens* as follows, to-wit: and also one note to Samuel Arnold, for $237.00—and to save the said Hezekiah harmless from all costs and expenses on account thereof. In witness whereof," &c.

Parker, C. J. said: "But we think the promise may be legally considered as made to the several creditors, whose debts the defendant undertook to pay, if they chose to avail themselves of his engagement. The promise was to pay certain particular debts; and there seems to be no reason why it should not be treated as a promise to the creditors. It being in writing and there being a sufficient consideration, it is no objection that it is a promise to pay the debt of another. The promise being not to Hutchens expressly, but general in its form, the assent of the creditors made them parties to the promise; and this assent is sufficiently proved, as respects the plaintiffs, by their bringing an action upon the contract. Generally he, for whose interest a promise is made, may maintain an action upon it, although the promise be made to another and not to him."

After the decision in *Ross* v. *Milne*, 12 Leigh, which was decided in 1841, and no doubt because of that decision the revisors of the Code in 1849 reported the following, which

was adopted as a part of the Code, sec. 2, ch. 116, and was again made part of the Code of 1860, sec. 2, ch. 116, and is now sec. 2, of ch. 71 of the Code of 1868:

"An immediate estate or interest in, or the benefit of a condition, respecting any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person, with whom it is not made, or with whom it is made jointly with others; such person may maintain, in his own name, any action thereon, which he might maintain, in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise."

I find no case in Virginia giving a construction to this statute. Without deciding its precise meaning this Court in *Nutter* v. *Sydenstricker*, 11 W. Va. 535, held it covered that case, although we were inclined to the opinion that the suit could have been maintained in that case at common law. The only case in Virginia which I have found, that refers to this statute is *Jones* v. *Thomas*, 21 Grat. 96. That was an action of covenant by Jones against Thomas on the following covenant or deed-poll:

"MARCH 12, 1863.

"I hereby bind myself, my heirs, &c., to pay ——— the amount of principal and interest due from W. A. Jones on the tract of land purchased by him of G. W. Jones and wife.

"Witness my hand and seal the day and date above.

"ABIJAH THOMAS, [SEAL.]"

The defendant craved *oyer* of the writing and demurred to the declaration, and the court sustained the demurrer and rendered judgment for the defendant, to which judgment plaintiff obtained a writ of error from the district court of appeals at Abingdon; where it was affirmed, and from which judgment he obtained a writ of error. Staples, judge, said:

"It is insisted that as the plaintiff in error is not a party to the instrument, nor the debt payable to him, he can maintain no action thereon in his own name. It is undoubtedly true that at common law an indenture or deed *inter partes* is only available between the parties to it and their privies; and third persons can maintain no action in covenant thereon

though made for their benefit. This rule however does not apply to deeds-poll, as to which it has been long settled that persons beneficially interested therein may sue, though not described as contracting parties. The distinction is founded in the form and qualities of the respective instruments. A deed *inter partes* is an agreement under seal between two or more persons executing the same, and entering into reciprocal obligations with each other. It is a solemn declaration that all the covenants comprised in the instrument are intended to be made between these parties and none others. A deed-poll on the other hand is the act of a single party, and is in the nature of a declaration made by him of his intentions or obligations to some other person * * In *Sunderland Marine Ins. Co* v. *Kearney*, 71 Eng. C. L. R. 925, 937, the objection was made that the plaintiff was improperly joined as a party, his name not being mentioned in the policy on which the action was brought, and in support of this objection much reliance was placed on the case of *Green* v. *House*. Lord Campbell delivering the opinion of the queen's bench, said it could not be meant by that rule that the party's name of baptism and his surname must be necessarily set out. If he be sufficiently designated in the deed, this must be enough to entitle him to sue for breach of covenant. A description, which can not be mistaken, is for this purpose as good as the actual name of the individual. And in *Fellows* v. *Gilman*, 4 Wend. 414, the supreme court of New York thus expressed the rule: 'It must undoubtedly appear that the covenant alleged to have been broken was made for the benefit of the person bringing the action. He must in some manner be pointed out or designated in the instrument, but it is not necessary his name should in terms be used. The defendant's covenant is to pay each and every person such sum as the constable shall become liable for. This in connection with the allegations in the declarations shows as satisfactorily as in the case of an heir or executor, that the plaintiff was one of the persons for whose benefit the covenant was executed.' See also 2 Lomax Dig. 9; 4 Comyn. Dig. 282; *Choles* v. *Conley's Heirs*, 2 Dana 21; *Webb* v. *Penn*, 17 How. U. S. 576. These cases show the inclination of the courts to give effect to the contracts of parties, and never to declare them void, if

by any reasonable and fair construction they can be made good. They establish the proposition, that persons not described as parties in deeds-poll, or even mentioned as having beneficial interest therein, may sue thereon in their own name, if it manifestly appear the covenants were made for their benefit. * * * If the covenant in this case had been made in fact with George W. Jones, as it might have been, there would be no question of his right to sue thereon in his own name. And I am inclined to think that, as it is for his benefit, although not made with him, he might maintain the action under the provisions of sec. 2, ch. 116, Code of 1860. These provisions however do not affect the interests of Wm. A. Jones, the plaintiff in error. The effect of this statute is not to divest rights but to afford remedies to parties not allowed by technical rules of pleading at common law. It is said however that on the face of the instrument here, it is uncertain whether the covenant was made with George W. Jones, and for his benefit, or with the plaintiff in error. It appears by an inspection of the paper as it was originally drawn, the blank was filled with the name of the plaintiff in error as payee, and the contract in that condition was a covenant to pay him the debt due George W. Jones. Subsequently the name of the plaintiff in error was erased by running a line across it, but yet leaving the name sufficiently distinct. It probably occurred to the parties after the instrument was drawn, that as the arrangement was for the defendant, Thomas, to pay an existing debt due to George W. Jones, it was inconsistent with that arrangement to stipulate for its payment to the plaintiff in error; and so the name was erased leaving it an obligation to pay George W. Jones. Whether this be or not the correct solution, the name of the plaintiff in error, in the connection in which it was mentioned, clearly indicates him as the real party to the transaction, and as the person for whose benefit it was made. This presumption is rendered conclusive by the delivery to the plaintiff in error, and his acceptance of the obligation."

The judgments were reversed and the cause remanded.

I do not say whether this case was decided correctly or not; whether W. A. Jones, or George W. Jones was entitled to sue on the covenant. But I am convinced that both would

not under the statute be entitled to maintain an action. If one could sue on it, the other could not. It was not intended for the benefit of both, in the sense that either could sue. It would not then, if equally for the benefit of *both*, be for the *sole* benefit of *either*, and the statute gives the right to the party to sue, *where the covenant or promise* is for the *sole* benefit of a party, with whom it is not made, or with whom it is made jointly with others. If a covenant were made partly for the benefit of several, whose names were not signed to the covenant or contract, and neither had a distinctive right to the benefit of that particular promise or covenant, I do not understand that a court of law would allow either of such persons to maintain a suit thereon under the provisions of the statute. But where even in a deed or indenture *inter partes* a certain covenant is made, as in many of the cases we have cited, for the sole benefit of a third person, not a party to the deed distinctly designated therein, such person now under the statute may maintain an action. In such case it will be regarded for the *sole* benefit of such person, where the primary object of the parties to the deed in that covenant relating to such third person was, to secure to him the payment of money, or to make other provisions for his benefit. But, if such covenant was merely incidental to an agreement between themselves, then it could not be regarded for the sole benefit of such third person. In case where the covenant referring in any manner to a third person or stranger, was only incidental to the covenants between the parties thereto, and not intended by them to make any provision for such third person or stranger, it would be unjust to the parties and inconvenient in practice, to permit such strangers to thrust themselves into the private affairs of others, and demand the production of their private contracts and sue thereon.

The statute provides for two classes, *first*, where the covenant or promise is made by one or more for the *sole* benefit of a stranger; that is, one who did not sign the covenant: *second*, where a covenant or promise between several persons is made for the *sole* benefit of one of them, who signed it, then in either case he, for whose sole benefit the covenant or promise was made, whether he was a party to the covenant or not, may maintain an action thereon in his own name. By

this construction the statute supplying what is necessarily understood would read as follows: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or (if a covenant or promise is made for the sole benefit of a person) with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise."

Now it seems to me that the parties to the covenant sued on here, did not, nor did they intend to, make the second promise of the covenant, the one in suit, for the sole benefit of David Johnson. The object in said provision was not to secure David Johnson the payment of the $350.00, one half the indebtedness of the old firm to him. They did not seem to contemplate making any provision for Johnson at all. The old firm was then solvent. They were taking new members into the firm, or rather forming a new firm. The old firm had sold to the new members "one half interest in all the machinery, equipments and press at Belfont Woolen Factory for the sum of $7,000.00. This was not all they were to pay to make them equal partners. By the fourth provision, "the stock of wool cloth and warp then in the factory was to be taken by the new firm at cost prices."

By the fifth provision each of the four partners in the new firm was to devote his individual services to such employment connected with their business, as might be assigned to him. By the second provision the new members, D. G. McClung and J. B. Anderson, were further to pay as a part of the consideration one half the indebtedness for the power, spinner, looms and other machinery purchased by D. C. Anderson & Co., for the sum of $700.00 in specie of David Johnson. There was no agreement, that these new members would *pay to David Johnson* the one half of said indebtedness. The language is: "D. G. McClung and J. B. Anderson hereby assume one half the indebtedness for power, spinner, looms and other machinery purchased by D. C. Anderson & Co. for the sum of $700.00 in specie of Mr. David Johnson." As, between the partners the new members in settlement among themselves would not have to pay any part of the indebtedness

of the old firm, unless they bound themselves by contract to pay the same. Used in the connection it is, the word "assumed" does not mean, that the new members would pay that amount *to David Johnson*, but would pay it to D. C. Anderson & Co., the members of the old firm. Suppose there had been $10,000.00 indebtedness on the books, and McClung and J. B. Anderson had in the contract said they "assumed" to pay one half that indebtedness without mentioning the name of a creditor, will it be said that any of these creditors under the provisions of the statute could sue? Yet the word is used in the same sense here as in the case supposed. It matters not therefore to the plaintiff in error, that the pleas were admitted, or that the court set aside the verdict in his favor; as it could not have been to his prejudice, he having no right to maintain this action.

The judgment of the circuit court is affirmed.

Judge Woods concurs.

Judge Green concurs in syllabus but dissents from the opinion.

AFFIRMED.

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26 672
38 723
26 672
39 199

CHARLESTOWN.

SHENANDOAH VALLEY RAILROAD CO. *v.* SHEPHERD *et al.*

Submitted September 8, 1885.—Decided October 2, 1885.

1. As a general rule the compensation to the owner for land taken for public purposes is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the near future. (p. 677.)

2. In estimating the value of the residue of a tract, a part of which has been taken for public purposes, the commissioners or jury should consider only such damage, as is peculiar to that particular tract, and not that which it suffers in common with all other tracts in the neighborhood. The damage to be estimated is that which directly or proximately results from the taking or use of the land for the purpose, for which it was taken, but should

not include such damage as arises from the fact, that the use of the land taken for the purposes, for which it was taken, would injuriously affect any business carried on upon such tract of land by increasing competition or in any like manner. Such injury is not an injury to the land but to the business, which is or may be transacted upon the land. (p. 681.)

GREEN, JUDGE, furnishes the following statement of the case:

This was a proceeding in the circuit court of Jefferson county instituted by the Shenandoah Valley Railroad Company to condemn a strip of land sixty-six feet wide and ninety feet long lying on the bank of the Potomac river at Shepherdstown in said county belonging to Fanny Shepherd, Alexander B. Shepherd and R. Davis Shepherd, in which Mrs. Elizabeth S. Shepherd had a dower interest. The proceedings in the case were all regular, and the commissioners appointed by the court reported, that they were of opinion, that $1,587.50 would be a just compensation for so much of said real estate as was proposed to be taken by the Railroad Company, which land was described in the report and stated to be then occupied partly by the road-bed and track of said railroad and partly by the abutment and southern end of the bridge of said railroad company where it crosses the Potamac river, as well as for damage to the residue of said tract beyond the peculiar benefits, which will be derived in respect to such residue from the work to be constructed. This report was filed May 15, 1883. The Shenandoah Valley Railroad Company excepted to the report and demanded a jury to ascertain the compensation to be paid the defendants for this strip of land taken from them by the company. On March 4, 1884, the jury who had been properly elected, tried and sworn and had viewed the premises and heard the evidence and arguments of counsel, found their verdict ascertaining, the compensation due the defendants for this strip of land proposed to be taken by the plaintiff to be $1,000.00 including damage to the residue of the real estate beyond the peculiar benefits, which will be derived in respect to such residue from the construction of this railroad. The strip of land taken from the defendants is described in this verdict, just as it was described in the application of the railroad company for the appointment of the commissioners.

The Shenandoah Valley Railroad Company moved the court to set aside this verdict and to grant it a new trial, which the court refused and entered up a judgment for the defendants against the plaintiff for their costs. The plaintiff took a bill of exceptions called in the record, bill of exceptions No. 3, to this ruling and judgment of the court; and in this bill of exceptions all the facts proven and all the evidence are certified. From the evidence so certified and the facts apparent on the face of the deed, under which the defendants claim, and a map which was also given in evidence, it appears, that all the facts proven before the jury were as follows: The tract or parcel of land owned by the defendants, through which the railroad passes, lying principally between two streets of Shepherdstown, if they were extended to the Potomac river, and belonging to these defendants and all claimed under the same deed, was a narrow slip of ground immediately on the bank of the Potomac and extending down the Potomac river in an easterly direction some three fourths of a mile to where Teagues run empties into the Potomac. This long slip is only about thirty yards wide and is a cliff on the Potomac river. The land to be taken by the railroad is the piece occupied by the railroad in crossing this long slip and is ninety feet long by sixty-six feet wide. It constitutes a natural abutment for the railroad bridge across the Potomac; and it would save between $6,000.00 and $7,000.00 to the railroad company in building this bridge, as it would cost the company this amount to build an equally good artificial abutment.

If in estimating the value of this parcel of land we were to exclude its enhanced value because of its being a natural abutment for a bridge, its value would be fifty dollars. The facts bearing on the estimate of the damage to the residue of the tract of land owned by the defendants, caused by the construction of the railroad is as follows: This long slip of land along the Potomac described in the deed, under which the defendants claim as "river cliff on the Potomac down to Teagues run," connects with the parcel of land owned by the defendants, which lies principally between two parallel streets of Shepherdstown, if they were extended to the Potomac river, the point where this narrow slip or "Potomac cliffs" con-

nects with this parcel of land lying principally between the extension of these streets to the Potomac river, is from fifty to seventy-five yards up the river from the railroad bridge. The street, which if extended would bound this parcel of land on the eastern side, is called Mill street; and on the western side it is bounded principally by a county-road extending from the end of Princess street in Shepherdstown to the Potomac river, where there is acounty-bridge across the Potomac. This county-road runs nearly parallel with Mill street extended, so that this parcel of land is in its general form a paralellogram and contains according to the testimony of Mrs. Elizabeth S. Shepherd about two acres, though the map indicates that it contains a considerably larger quantity. On this parcel of land of two acres or more are a saw-mill, a grist-mill and a warehouse and along the river part of it is a wharf. As the railroad-track lies entirely east of Mill street extended, the grist-mill must be at least one hundred yards from the railroad-track, and the saw-mill at least 150 yards from it. The railroad-track must also be on ground very much elevated above either the saw-mill or grist-mill, as the railroad is on a high bluff, while these mills are on a run, which empities into the Potomac river 200 yards from the railroad-track. The warehouse is about 200 yards from the railroad-track on the extreme western border of the tract and on the county-road leading to the bridge. Very near this county-bridge is a ferry across the Potomac. The exact location of the wharf is not noted on the map but it can not be less than fifty yards from the railroad-track and bridge. There was no testimony before the jury to indicate that any damage would result to the residue of the tract by the construction of the railroad, except that Mrs. Elizabeth S. Shepherd, one of the defendants, says that the warehouse, wharf and mill-property were greatly depreciated by the fact that the railroad company had taken the sixty-six by ninety feet for the purposes, to which it is to be appropriated.

During the progress of the trial two other bills of exceptions were taken by the Shenandoah Valley Railroad Company. They were as follows:

"BILL OF EXCEPTIONS No. 1.

"Be it remembered that on the trial of the cause testi-

mony was introduced by the defendants tending to show that the bank of the river embraced within the 90x66 feet proposed to be taken by the Shenandoah Valley Railroad Company and belonging to the defendants, was valuable as a natural abutment for a bridge; thereupon the court, at the instance of the defendants, instructed the jury as follows:

"INSTRUCTIONS.

"The court instructs the jury that in ascertaining the value of the land proposed to be taken by the S. V. R. R. Co., they will enquire into its value for any or all purposes for which it may be legitimately used or appropriated, including its value to the proprietors as a natural abutment for a bridge, but in considering its value they will do so without considering its enhanced value by reason of the construction of the said Shenandoah Valley Railroad.

"And at the instance of the said Shenandoah Valley Railroad Company, the court instructed the jury as follows:

"INSTRUCTIONS.

"The court instructs the jury that in estimating the value of the land taken by the Shenendoah Valley Railroad Company for its purpose in this case, it will consider its actual value at the time it was taken and not its prospective value with reference to any mere possible uses, but only with reference to such uses as may be reasonably expected in the immediate future.

"To the granting of which said first named instruction, the Shenandoah Valley Railroad Company excepted, and prayed that this its bill of exceptions should be signed, sealed and enrolled as a part of the record, which is accordingly done."

"BILL OF EXCEPTIONS, No. 2.

"Be it remembered that on the trial of the issue in this case, the defendants introduced as a witness Mrs. E. S. Shepherd, to whom they propounded the following questions, after having proven the facts set out as proven in bill of exceptions No. 3 as to the improvements and uses of the property shown in part by plat B., to which reference is hereby made:

"First Question.—Was the wharf property depreciated by reason of the taking of the 90x66 feet for the purposes for which it was sought to be appropriated?

"Second Question.—Was the mill property depreciated by reason of the taking of the 90x66 feet for the purposes for which it was sought to be appropriated?

"Third Question.—Was the warehouse property depreciated by reason of the taking of the 90x66 feet for purposes for which it was sought to be appropriated?

"To which said several questions the Shenandoah Valley Railroad Company objected, but the court overruled the said objections, and the said witness answered the said questions respectively as follows:

"1. The wharf property was greatly depreciated thereby.

"2. The mill property was greatly depreciated thereby.

"3. The warehouse property was greatly depreciated thereby.

"To which said action of the court overruling the said objections and permitting the said witness to answer the said questions as aforesaid, the said Shenandoah Valley Railroad Company excepted, and asked that this its bill of exceptions should be signed, sealed and enrolled and made a part of the record, which is accordingly done."

To the judgment of the circuit court rendered March 4, 1884, refusing to award a new trial to the Shenandoah Valley Railroad Company it obtained an appeal and *supersedeas*.

W. H. Travers for plaintiff in error.

G. Baylor and *G. M. Beltzhoover* for defendants in error.

GREEN, JUDGE:

The instructions set out in the first bill of exceptions were intended to lay down a rule to govern the jury in its appraisement of the value of the parcel of land ninety feet long by sixty-six feet wide taken by the railroad company from the defendants. Upon this question Judge Field in delivering the opinion of the Supreme Court of the United States in *Boom Company* v. *Paterson*, 98 U. S. 408, says: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully governed rule; but as a general

thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the immediate future." Just preceding this Justice Field had said: "In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is applied, but with reference to the uses for which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market-value which can be readily estimated."

In that case the defendant, Paterson, owned certain islands in the Mississippi river above St. Anthony's Falls. The position of these islands especially fitted them in connection with the west bank of the river to form a boom of very extensive dimensions at a very small cost. The jury found a general verdict for $9,358.33, but found specially, that the compensation which the owner of the land was entitled to, if the adaptability of these islands for boom-purposes was not considered, would be $300.00; but if it was considered, his just compensation they estimated at $9,058.33. The company asked a new trial and the court granted the motion, unless the proprietor would reduce the verdict to $5,500.00, which he elected to do; and judgment was rendered accordingly. In the opinion of the Supreme Court it appears, that the boom-company claimed, that no one but them could use these islands for boom-purposes, they having by their charter a monopoly of this business on the river. And, as I understand the court, if this had been true, the value of these islands for boom-purposes should not have been included in the estimate of the proprietor's compensation; but as this boom-company had no such monopoly, the special value of

these islands for boom-purposes was properly considered in fixing the compensation of the proprietor. (pp. 408–9.) It appears from this case, that the Mississippi river is a navigable stream above St. Anthony's Falls, and that booming of timber on it was a business; and though the evidence is not stated very fully, yet from what is said in the opinion, I think, the inference is but fair, that this business of booming was such as to add to the market-value of these islands because of their adaptability for booming-purposes. In the paragraph we have quoted Judge Field says: "Regard should be had to the existing business or wants of the community or such as may be reasonably expected in the immediate future." I presume in this case there must have been evidence, which justified the jury and the court in holding, that the market value of these islands was increased by the condition of the existing boom-business on this part of the Mississippi river or by what could be regarded would be the condition of this booming-business in the immediate future. I am the more persuaded that this was so, because the court cites approvingly on page 410 the case of *Young* v. *Harrison*, 17 Ga. 30, where the court say of this case: "In it, where land necessary for the abutment of a bridge was appropriated, the supreme court of Georgia held, that its value was not to be restricted to its agricultural or productive capacities, but that enquiry might be made as to all the purposes to which it could be applied having reference to the existing and prospective wants of the community. Its value as a bridge-site was, therefore, allowed in the estimate of compensation to be awarded to the owner." My inference from this case, relied upon by the defendant in error, is that which is drawn by the reporter in the syllabus of the case and that is: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties, the enquiry in such case being, what, from their availability for valuable uses, are they worth in market." And "as a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." It seems

to me, that the law is as correctly and as definitely laid down in the syllabus of this case as it can well be done, except that instead of using the words in the conclusion "or such as may be reasonably expected in the immediate future," I would deem the law more accurately stated if the language had been: "or such as may be reasonably expected in the near future." The value of property at a remote future time is inadmissable as a basis for assessing its present value; it partakes too much of the speculative. See *Everett* v. *Union Pacific Railroad Co.*, 10 American and English Railway Cases, 204, 206. The wants of the community in the future must be in a future not so remote as not to affect the present market value. (See *Cobb* v. *Boston*, 112 Mass. 183.)

Not confining ourselves to the facts set forth in the preamble to the instructions given by the court, as set forth in the first bill of exceptions, but looking to all the evidence in the case, as set forth in the third bill of exceptions, which we have a right to do, can the plaintiff in error object to the instructions contained in the first bill of exceptions? If we take the two instructions set out in the first bill of exceptions together, it seems to me, while the law is not as definitely and clearly laid down, as it might have been in connection with the actual evidence in the case, and while the first instruction, the one given at the instance of the defendants, was perhaps calculated from the nature of the facts in proof in the case to mislead the jury, yet, as the law laid down by it can not be in itself said to be erroneous, and as the plaintiff asked no modification of the instruction, I do not think a new trial ought to be awarded because of anything appearing in the first bill of exceptions. But this instruction, if the request had been made by the plaintiff below, ought to have been modified so as to read: "The court instructs the jury, that in ascertaining the value of the land proposed to be taken by the Shenandoah Valley Railroad Company they may properly enquire into its value by reason of its being a natural abutment for a bridge across the Potomac, but in making such estimate they must have reference to the existing needs of the community for another bridge across the Potomac at or near Shepherdstown or to the probable need of such other bridge across the Potomac at or near

Shepherdstown in the near future; but in considering the market-value of this natural abutment of this bridge they must not consider the uses to which the Shenandoah Valley Railroad Company had put this ground in constructing its railroad." When so modified and given the instruction asked by the railroad company set out in the first bill of exception need not have been given, as it would have been covered by the above instruction.

Having stated as accurately as can be done the rule proving the appraisement of the real estate actually taken, I will now consider how the damage to the residue of the tract beyond the peculiar benefit to the same from the construction of the road should be estimated. In the first place it is settled that no benefit, which the residue of the tract derives from the construction of the road in common with other adjoining tracts, can be abated from the damage to the residue of the tract; as by the very words of the statute, to justify such abatement, the damage must be abated only by the *peculiar* benefit to the tract; such for instance as draining it by the construction of the railroad. It would be obviously unjust to the proprietors, if by an abatement of their damages they were made to pay for benefits enjoyed by them in common with persons, through whose lands the railroad did not pass. It would seem to be equally obvious, that the railroad company ought not to be required to pay for damage to the residue of the tract, where such damage was only such as the proprietors of the land suffered in common with other owners of land, through which the railroad did not pass, where such damage was such as such owners, through whose land the railroad did not pass, could not recover for. In other words the railroad company ought not to pay the proprietors for damage to the residue of the tract, when such damage was of such a character, as made it common to the entire neighborhood, though it may have arisen from the construction and operation of the railroad. Such damage is *damnum absque injuria* and ought not to be recovered. As for example damage resulting from the loss of custom to one's mill, wharf or store, though they be on the tract of land, through which the railroad passes, is not such damage as can be estimated by the commissioner or by the jury in as-

sessing damage to the residue of the tract. Such damage is only such as is sustained by the proprietors of the tract, through which the railroad passes, in common with all other owners of mills, wharves and stores in the neighborhood, on land through which the railroad did not pass. It is not properly damage to the property arising from the construction of the railroad, but is more properly speaking damage to the trade of the proprietors resulting from the subsequent use of the railroad. (*Cadonian Railway Company* v. *Walker's Trustees*, L. R. 7 App. Case 6; Am. & Eng. Railroad Cases, 536.7; *Brand's Case*, 4 H. L. 171; *Rex* v. *London Dock Co.*, 5 Ad. & E. 163.)

To justify the making of an allowance for damage to the residue of the tract, the damage must be such as results directly and proximately to the property itself from the construction and operation of the railroad, such for instance as the obstruction of access to the property, the obstructing or diverting of a mill-race, the increased danger of fire to a store in consequence of the proximity of the railroad-track. It is very obvious that no damage of this description was sustained by the mills, wharf or warehouse in the case before us, regarding them, as I do, as a part of the tract, through which the railroad passed. The saw-mill and grist-mill were on a run which flowed through this tract of land; but the map shows, that the railroad was constructed on a bluff, which was not nearer to this run, where it passed through this tract, than 100 yards. Of course the mill-races of these mills could have neither been obstructed, diverted nor in any manner interfered with by the railroad; and the mills themselves could have been in no way directly injured by the construction or running of the railroad. It could not have endangered them by fire from the locomotives; it could in no way have obstructed any road to them or in any way have injured them proximately or directly; and the same is obviously true of the warehouse, which was situated on a road some 200 yards distant from the railroad; and though, for all that appears in the record, the wharf may have been within fifty or seventy-five yards of the railroad, yet, as it was on a level with the river, and the railroad was elevated above it on a bluff of a very considerable height, it is impossible that it could

have been injured in any manner directly or proximately by the railroad. No road to it could have been obstructed by the railroad-track. Nor could any other direct injury, which I can conceive of, be done to it by the railroad. It is true, the map does not on its face show the elevation of the railroad above the river, but it must have been considerable, as it was necessarily on a level with the railroad-bridge, which must have been considerably elevated above the river.

But it is contended by the appellee's counsel, that, though all the evidence offered to the jury or all facts proven before them during the trial were certified by the court, yet the jury may have acted upon other facts not before this Court, which they obtained by their personal view of the premises, and therefore, as this Court can not know all the facts, on which they acted, the verdict of a jury should never be set aside by an appellate court, because the damages are regarded as excessive. It is unquestionably true, that an appellate court ought never to set aside the verdict of a jury in a condemnation case, where the jury have viewed the premises, unless the facts proven in court before the jury are such as show their verdict to be grossly excessive in amount, after supposing that everything was seen by them upon the view, which tended to increase the damage, which could be supposed to be seen on a view of the premises, and which is not utterly inconsistent with the facts actually shown to have been proven in court. Such utterly inconsistent facts will not however be supposed by the appellate court to have appeared upon the view of the jury. Thus in this case this Court can not suppose, that the view of the jury showed them that the warehouse was endangered by fire from the locomotives, as it was proven by the map, which was before the jury at the trial, that it was 200 yards distant from the railroad.

I am therefore of opinion, that the circuit court erred in permitting the three questions set out in the second bill of exceptions to be propounded to Mrs. Shepherd, one of the defendants. In answer to these questions she said, that the wharf-property, the mill-property and the warehouse-property were greatly depreciated by reason of the taking of ninety by sixty feet of the land of the defendants by

the railroad company for the purposes, for which it was sought to be appropriated by the company. She obviously meant that the business done at these mills, warehouse and wharf would be greatly injured by the competition which the running of cars on the railroad would bring about. This, we have seen, was a damage, which the jury had no right to consider in making up their verdict. The record shows by the preamble set out in bill of exceptions No. 2, that the facts, which had been proven, when these questions were propounded, that neither of the mills, the warehouse, nor the wharf could by any possibility be injured or damaged proximately or directly by the building of the railroad; and as this was entirely obvious, the court ought not to have permitted questions to be propounded to Mrs. Shepherd, her answers to which could not according to a correct view of the law tend to enlighten the jury in the performance of their duty but might as doubtless they did tend to mislead them. Such questions might be very proper, if the facts before the court did not show, as in this case they did, that the answering of them could not enlighten the jury but might mislead them.

Of course I can not tell how the jury arrived at their verdict of $1,000.00 in this case; but, as the proof was clear, that excluding this supposed damage to the mills and warehouse and wharf and the value of the land as a natural abutment for a bridge it could not have exceeded $150.00, the estimate of the jury must have been made up to a large extent from this supposed damage or from a valuation by the jury of this land as a natural abutment to a bridge. Now I have shown, that in valuing this ground as a natural abutment to a bridge the jury must have reference to the existing and prospective wants of the community whom the bridge would accommodate. Upon this important point there was absolutely no evidence before the jury except that to be derived from the map produced in evidence and what appeared upon it. It is true the jury and this Court can take judicial notice, that the Chesapeake and Ohio canal runs along the bank of the Potomac river opposite Shepherdstown, and from this fact an inference might justly be drawn, that there would be considerable trade and business between Shepherds-

town and Jefferson county and this canal, and that a bridge would be wanted probably at Shepherdstown to accommodate this trade and business. But the map produced before the jury had marked upon it a road from Shepherdstown to the Potomac and not only a county-bridge across it but also a ferry. Whether these were sufficient to accommodate the public, or whether there was then a demand for another bridge at or near Shepherdstown for the accommodation either in reference to the existing business or to the prospective business in the near future could not be inferred from this the only testimony before the jury. It could not be ascertained by an inspection of the premises by the jury upon their view of the ground but could only be proven by witnesses before the jury. No such proof was offered; and it does seem to me, that upon correct principles of law, such as I have laid down, on this very scanty and unsatisfactory evidence as to the existing business or wants of the community or such as might reasonably be expected in the near future the jury would not have been justified in assessing the value of this ground as a natural abutment for a bridge across the Potomac river at $950.00, as they, it would seem, must have done, unless they allowed for this supposed damage to these mills, warehouse and wharf, which they ought not to have done.

I have stated, that with the exception of the facts appearing on the map before the jury there was no evidence of what demand, if any, there was for a bridge other than the one then in existence across the Potomac at or near Shepherdstown. It is true, that Mrs. Shepherd, one of the defendants, does say, that she estimates this ninety feet by sixty feet taken by the railroad company at $5,000.00. "And she estimates this value from the fact that it is used as an abutment for the railroad-bridge; that she had always valued it as an abutment for a bridge, before the railroad came there; was worth that much not to have a bridge built upon it." This opinion of Mrs. Shepherd, a party interested, would certainly be a very unsafe foundation for the verdict of a jury. She says she always valued it as an abutment for a bridge. In this she was probably right. But that furnishes no information, on which a jury could fix its value. What she meant by saying it "was worth $5,000.00 not to have a bridge built

upon it," is difficult to say. The literal meaning of such language is, I suppose, that in her opinion it was worth $5,000.00 leaving out of consideration its value as a natural abutment for a bridge. But it is impossible that she could have meant this, as four farmers residing in Jefferson county concur in estimating this property, which they had examined, as worth but $50.00, excluding from their estimate its value as a natural abutment for a bridge; and there is no evidence to show that this is an under estimate. I suppose Mrs. Shepherd meant to say, she thought this property was worth $5,000.00 even though the railroad company had not built their bridge there. But as she furnishes none of the facts which it has been shown is necessary for any one to put a proper estimate on the present value of a natural abutment for a bridge, her opinion was entitled to very little weight before the jury.

For these reasons I am of opinion, that the circuit court erred in not setting aside the verdict of the jury and granting a new trial on the motion of the railroad-company; and that for that reason its judgment should be reversed and a new trial awarded, and the cause remanded to the circuit court to be proceeded with according to the principles laid down in this opinion.

REVERSED. REMANDED.

CHARLESTOWN.

NEELEY v. RULEYS.

Submitted September 10, 1885.—Decided October 2, 1885.

1. In a suit to enforce a vendor's lien it is not error to decree a sale of the land, on which the lien for the purchase-money is reserved, without other lienors being made parties and the amount and priorities of their liens settled. (p. 688)

2 In a suit to enforce a vendor's lien the defendant filed an answer averring that there were many judgment-liens, against the plaintiffs lands, and that he did not have other lands beside the tract sold defendant sufficient to discharge said liens but did not aver, that the plaintiff was insolvent. The court did not err

in refusing to set aside an order of sale on this ground, nor in refusing to send the cause to a commissioner to enquire into the matters set up in the answer. (p. 690.)

3. A decree for the sale of land without providing therein that, before the commissioner shall sell the land, he shall execute a bond in a penalty prescribed by the court, is erroneous and for such error will be reversed. (p. 691.)

4. A plaintiff in a suit to enforce a vendor's lien can not waive the bond required by the statute of the commissioner appointed to make such sale (p. 692.)

The opinion of the Court contains a statement of the facts of the case.

R. S. Blair for appellant.

Edwin Maxwell for appellee.

JOHNSON, PRESIDENT:

At February rules 1885 the plaintiff filed his bill in the circuit court of Doddridge county to enforce his vendor's lien on a tract of land sold and conveyed to defendant. On March 20, 1885, a decree was rendered on the bill taken for confessed to sell said land for the payment of the purchase-money, and in the decree the plaintiff "expressly waived bond and security from the commissioner" appointed to sell the land. On April 6, 1885, at the same term the defendants appeared and moved to set aside the said decree ordering the sale of said land, which motion the court overruled. Thereupon the defendants tendered their answer and demurrer to plaintiff's bill and asked leave to file the same, which was ordered to be done; and the complainant filed his replication in writing thereto, to the filing of which the defendants objected, which objection was overruled. The defendants tendered a bill of exceptions to the refusal of the court to set aside the decree and to the refusal to enter a decree prepared by the defendants' counsel, showing that the court refused to set aside the decree and to refer the cause to a commissioner, &c., which bill the court refused to sign, therefore the defendants' counsel tendered a bill of exceptions to the refusal of the court to sign the first bill of exceptions, which embraced the first bill; and this the court signed.

The answer of defendants exhibits the abstracts of a number of docketed judgments against the plaintiff and avers "that the lands now owned by the complainant are not sufficient within themselves to liquidate and discharge the liens hereinbefore set forth, and therefore that redress would have to be had against the land sold to respondent." It avers the readiness of the defendants to pay the purchase-money due, "if the said liens are released by the creditors of said Neely, and that they ought not to be compelled to pay said money until the complainant removes the aforesaid liens." It further avers, that no decree of sale of the land can be had until all the liens existing against the same shall have been ascertained by a convention of the creditors before a commissioner appointed by the court, and asks a reference to a commissioner to ascertain the amount of all the real property owned by plaintiff and all the liens existing against the same, and what liens exist against the property purchased by defendants, and asks that the purchase-money due from respondents may be applied to the discharge of the liens against the land sold to them, so as to secure the land bought by them and save them harmless.

The special replication sets up the facts, that many of the liens mentioned in the answer have been discharged, and that others, if not discharged are barred by the statute of limitation. It admits that one lien, that of the *State* v. *John Donohue* and sureties, of whom complainant was one, will have to be paid in part by plaintiff, but that he has ample property to pay such part, without the property sold to defendants, &c.

From said decrees the defendants appealed.

The first assignment of error is the refusal to set aside the decree of sale upon the filing of the answer at the same term, at which the decree was entered, because the answer showed that there were many judgment-liens against the lands of the plaintiff, and such lienors should have been made defendants to the bill. There is nothing in this assignment, because in a suit to enforce a vendor's lien it is not error to decree a sale of the land, on which the lien for the purchase-money is reserved, without ascertaining the amount of other liens and their priorities. (*Cunningham* v. *Hedrick*, 23 W.

Va., 579.) It was not necessary therefore, that such lienors should be made parties to the suit. The doctrine applicable to creditors' suits does not apply to a suit to enforce a vendor's lien.

It is also objected, that the court failed to pass upon the demurrer. The appellants were not predjudiced by this, as an inspection of the bill will show, that it is sufficient, and that the demurrer ought to have been overruled.

The third assignment of error is, that the court permitted the special replication to be filed to defendants' answer. Special replications are discountenanced in chancery pleading, and it is error to permit them to be filed except as the statute requires in certain cases, as this Court has repeatedly held; but the filing of the special replications did not prejudice the appellants.

The fourth and fifth assignments of error raise the question, whether upon the averment in the answer, "that the lands now owned by the said complainant were not sufficient within themselves to liquidate and discharge the liens set forth in said answer, therefore relief would have to be had against the lands sold to the defendants," which, it is claimed, was admitted to be true, there being no general replication to the answer, it was the duty of the court to set aside this order of sale and send the cause to a commissioner to ascertain the liens against the land so sold, so that the purchase-money might be applied to the discharge of these liens, and thus save the defendants harmless. *Wamsley* v. *Stalnaker*, 24 W. Va. 214 was an injunction to restrain the collection of a judgment on a bond for purchase-money, on the ground that there were a number of judgments, which were liens upon the land bought by the defendants of the plaintiff, and the bill specifies them in detail and files with the bill copies thereof, exceeding in amount the judgment on the purchase-money-bond; and the bill alleges that those judgments are unpaid, and prays that the plaintiff be forever enjoined from collecting said judgment, and that the various liens, against the lands be reported according to their priorities, and for general relief. The covenants in the deed in that case were much stronger than in this. In addition to the covenant of general warranty (the only covenant here) he covenanted

that "he was seized of said tract of land and had good right and title to convey the same," also that "the same shall not be subject to any liability from incumbrances thereon except for the vendor's lien in favor of Jacob H. Arbogast, which is hereby expressly reserved." The court held, that on such a state of facts, where there are recorded judgment-liens on the land at the time of the conveyance, a court of equity will not enjoin or stay the collection of a judgment against the vendee for the purchase-money of the land, unless the bill shows, that the vendor has no other lands sufficient to satisfy such judgment-liens, and that he is unable to pay them because of his pecuniary condition.

If it appeared in defendants' answer, that Neely had not other lands sufficient to satisfy all the liens, and that he was insolvent, a court of equity, before it would order the payment of the purchase-money to him, would provide for the protection of the vendees. This could be done by the payment by the vendees of the purchase-money into court, and the retention thereof by the Court, until the liens on the land were discharged; but if all the averments in the answer be taken as true, they do not show, that Neely is insolvent, the averment, that it will be necessary to subject the lands bought by the defendants, not being equivalent to such an averment. Even if this were so, the parties could protect themelves, as before indicated, by paying the money into court, and having an order made to protect their interests. The answer shows no reason for arresting the sale of the land, because after sale the order could be made for the protection of the purchaser, by refusing to pay over the money to the plaintiff until the liens on the land were discharged if equity required this to be done. The court did not err in refusing to set aside the order of sale and refusing to refer the cause to a commissioner.

The court did not err in refusing to sign a bill of exceptions. Bills of exceptions are unknown to chancery practice and pleading. If a bill of exceptions were proper, it could not be taken to a refusal to sign a bill of exceptions. The only way a judge can be compelled to sign a bill of exceptions is by *mandamus*. (*Henry* v. *Davis*, 13 W. Va. 230.)

It is also assigned as error, that the decree waived the execution of bond by the commissioner appointed to make the sale. The commissioner will not be likely to make the sale without executing the bond. The last clause of sec. 1 of chap. 142, Acts 1882, p. 444 provides: "And no sale shall be made by such commissioner, until such bond and security has been given and approved by the clerk; and every notice of such sale shall have appended to it the certificate of such clerk, that bond and security have been given by the commissioner as required by law. The same section also declares, that no special commissioner appointed by a court shall receive money under a decree or order, until he gives bond with good security before the said court or its clerk, and any special commissioner violating the provisions of this section by receiving money before executing bond as aforesaid, shall be deemed guilty of a contempt of court, and shall be punished by fine and imprisonment or either at the discretion of the court."

It would be very hazardous for a commissioner under a decree authorizing him to sell to receive any money before executing the bond. This clause is intended to prevent commissioners from receiving money under such decree, until the bond is executed; but the last clause forbids a sale under such decree until the bond is executed, and the certificate of the clerk that such bond has been given is appended to the notice of sale so that bidders may know, that the law has been complied with in this important respect. The statute is mandatory not directory. It *forbids* the sale until the statute has been complied with, and if the sale is made without the bond being executed, it may be set aside. The decree therefore, which in terms dispenses with the bond, is necessarily erroneous. It must provide for the bond and fix the penalty thereof, otherwise a bond could not be executed before the clerk. The law requires a bond, and in accordance therewith it has been the practice for decrees to require one and to fix the penalty. Sometimes sales have been made by commissioners without executing bond, and much trouble and loss have been the result; now the statute affords the remedy by declaring no sale shall be made, until bond is executed, &c.

But it is said the plaintiff could waive the bond. Such a thing is not contemplated by the statute. Of course, if all the parties to the suit, who were or might be interested in the giving of the bond, were to enter a consent-decree, that no bond should be executed, while it would be in violation of both the spirit and the letter of the statute, yet on well settled principles, it being a consent-decree, it could not be reviewed. The decree should have required bond and should have fixed its penalty. Because it did not so require, it must be reversed at the costs of the appellee, and the cause is remanded for further proceedings.

REVERSED. REMANDED.

CHARLESTOWN.

26 692
43 132

SOUTH BRANCH RAILWAY CO. *v.* LONG.

Submitted September 5, 1885.—Decided October 2, 1885.

1. There is a demurrer to a declaration and to each of the six counts thereof, the court sustains the demurrer as to *four* counts and overrules it as to *two* which set out a different cause of action. A subsequent order, which recites, that the demurrer had been sustained as to four of the counts in the declaration leaving and sustaining only the third and fourth counts, says as to them: "On which the plaintiff is unwilling to risk his case alone, he suffers a non-suit as to them without fine, which the defendant waives," and then proceeds: "It is therefore considered by the court, that the plaintiff be nonsuited as to said counts, and that defendant recover against the plaintiff his costs herein expended." HELD:

   I. It was not a nonsuit as to the two counts. If a nonsuit at all, it went to the whole case, as there is no such thing as a partial nonsuit.

   II. It was not a nonsuit but was a *retraxit* as to the said third and fourth counts, and a final judgment on the demurrer to the other *four* counts.

   III. It was also a judgment against the plaintiff on the said third and fourth counts, and no suit could ever be prosecuted for the same cause of action, as is set out therein or in either of them.

The opinion of the Court contains a statement of the facts of the case:

Robert White for plaintiff in error.

Daniel B. Lucas for defendant in error.

JOHNSON, PRESIDENT:

This was an action of trespass on the case in *assumpsit* brought in the circuit court of Hampshire county in 1874.

The declaration is as follows:

"HAMPSHIRE COUNTY, TO-WIT:

"IN THE CIRCUIT COURT.

"THE SOUTH BRANCH RAILWAY COMPANY, plaintiffs, } *Ass'p't.*
vs.
CONRAD LONG, Defendant. }

"The plaintiff complains of Conrad Long, being summoned, &c., of a plea of trespass on the case in *assumpsit*, for that, whereas, heretofore, to-wit, on February 25, 1871, the Legislature of West Virginia passed an act entitled, 'An act to incorporate the South Branch Railway Company,' whereby a number of persons were appointed commissioners to open books of subscription to the capital stock of said company in shares of $100.00 each to the amount of $50,000.00, which was allowed to be increased by the sale of additional shares to the amount of $500,000.00, for the purpose of constructing, equipping and operating, by steam or otherwise, a railway from Romney, in said county, to the Baltimore and Ohio Railroad, between the South Branch and Patterson's creek bridges; and afterwards, to-wit, on June 17, 1871, at, &c., the sum of $8,000.00 (and afterward and not exceeding $50,000.00) to the capital stock of said company having been subscribed by various persons (not less than twenty in number) under the provisions and by virtue of said act, in shares of $100.00 each, as required by law, the said company did then and there, in general meeting of stockholders assembled, organize as provided by law, and said company then and there became fully organized and incorporated under the corporate name of the South Branch Railway Company; that on, &c., at, &c., upon a book of said stock subscription, the said defendant did subscribe for five shares of said capital

stock of the par value of $500.00, together with others who subscribed various other shares, and some of them with the understanding and agreement with said defendant that he would and did subscribe for said five shares, and in consideration thereof, that said subscriptions were made under a heading in these words to-wit: 'The subscribers promise and bind themselves severally to pay unto the capital stock of the South Branch Railway Company the shares of stock affixed to their names (of $100.00 each), as shall be required by said company after its organization;' and said defendant did then and there, duly and fully, become a subscriber to the capital stock and a stockholder in said company; and said plaintiff avers that afterwards, to-wit, on, &c., at, &c., the plaintiff (through its individual members), on the faith of said subscription and the stock taken by said defendant and other parties as aforesaid, did, in order to give credit to said company and to raise funds to carry on the work of constructing said railway as proposed, guarantee the payment of $35,000.00 of the said subscribed stock of the road aforesaid; and further, said plaintiff avers that heretofore, to-wit, on, &c., at &c., the plaintiff on the faith and dependence that said defendant would keep his said promise and pay in said stock as required, let the construction of said road to contract, and did cause the construction of said road to be entered upon and progressed in, whereby said plaintiff was required to expend large sums of money and to become liable to pay further sums; and on May 28, 1873, the work on said road having commenced, the said company, by an order of its duly authorized board of directors, did require that said stockholders should pay an instalment of ten *per cent.* on each share of their stock subscription on or before June 10, 1873; also ten *per cent.* on each share, thereafter to be paid monthly on or before the 10th day of each month until the subscription be paid up, of which requirement said defendant then and there had notice; and although defendant was, on, &c., at, &c., duly notified and required to pay in the eight several instalments which became payable June 10, 1873, and in every month since, the defendant has wholly failed to pay the same, whereby, and by force of the statute in such case made and provided, an action has accrued to plaintiff to have and de-

mand of the defendant eighty *per cent.* of his five shares of stock aforesaid, with ten *per cent. per annum* interest on each instalment from the time the same became payable as aforesaid, the aggregate amount of principal payable at the institution of this suit amounting to $400.00; and being so liable, the said defendant, afterwards, to-wit, on, &c., at, &c., in consideration thereof, did undertake and faithfully promise the plaintiff to pay it the said sum of $400.00, with interest as aforesaid, whenever thereunto afterward requested.

"Second.—Also, for that, whereas, heretofore, to-wit, on the — day of ——, 1871, at, &c., the said defendant made, signed and executed, for the use of plaintiff, a certain paper writing, without date on its face, whereby he promised and bound himself to pay into the capital stock of the South Branch Railway Company, for five shares of stock of $100.00 each, making the gross sum of $500.00, to be paid when and as the said company should require the same to be paid, after its organization, which said writing was then and there made and delivered to the commissioners for and agents of said company, for its use, and accepted by it. And the plaintiff avers that said company was organized on June 17, 1871, at, &c., whereof the defendant then and there had notice, and afterwards, on May 28, 1873, at, &c., the work on the South Branch railway having been commenced, the said company, by the order of the duly authorized board of directors, did require the defendant to pay ten *per cent.* on said $500.00 on or before June 10, 1873, also ten *per cent.* on each share of stock, thereafter to be paid monthly on or before the 10th day of each month until the whole amount of said $500.00 be paid up; and the plaintiff avers that eighty *per cent.*, amounting to $400.00 of said gross sum has been thus required by said company to be paid prior to the institution of this suit, and the defendant on, &c., at, &c., had notice of said requirement, yet refuses to pay the same. Wherefore an action accrued to plaintiff to have and demand of the defendant the said sum of $400.00, with interest; and being so liable, said defendant, afterwards, to-wit, on, &c., at., &c., undertook and faithfully promised said plaintiff to pay it said $400.00 and interest whenever he should be thereunto afterwards requested.

"Third.—Also, for this, that the said defendant heretofore, to-wit, on, &c., at, &c., in consideration that the plaintiff then and there agreed to sell him five shares of its capital stock at its par value of $500.00, he, said defendant, then and there agreed to purchase the same at the price of $100.00 a share, and pay for the same as and when he should be required by said company; and afterwards, to-wit, on, &c., at, &c., on the faith of the sale of said stock to defendant, and that he would keep and perform his said agreement, the said plaintiff (through its individual members,) in order to raise the credit of said company, and to raise funds to carry on the work of constructing said company's proposed railway, did guarantee that said five shares of stock, agreed to be taken as aforesaid, would be so taken and paid for by defendant according to the contract; and on, &c., at, &c., the plaintiff, on the faith that said five shares of stock would be so taken and paid for by defendant, let the construction of its railway to contract, and laid out and expended large sums of money in such construction, and became liable to pay other sums therefor; and said plaintiff avers that it has always been ready and willing to carry out said contract on its part, and has offered to sell and transfer to said defendant said five shares of its stock for said price as agreed on; and on May 28, 1873, at, &c., said company (by an order of its authorized board of directors) did require said defendant to pay ten *per cent.* on his said stock agreed to be taken as aforesaid, on or before June 10, 1873, and also 10 *per cent.* per month thereon in each subsequent month till the same should be paid for in full, whereof defendant then and there had notice, and the payment of said monthly instalments, was, on and at, &c., duly demanded of defendant, yet defendant refused to pay the same, or any part thereof, and refused to comply with his said agreement, but has openly repudiated the same, whereby said defendant is greatly damaged, to-wit, in the sum of $600.00.

"Fourth.—Also, for this, to-wit, that the defendant, heretofore, to-wit, on, &c., at, &c., was indebted to the plaintiff in the sum of $500.00 for five shares of the capital stock of said company before that time bargained and sold by said plaintiff to him, at his special instance and request, and being so indebted, afterwards, to-wit, on, &c., at, &c., he, said defend-

ant, undertook and promised said plaintiff to pay it said last mentioned sum of money whenever afterwards requested.

"Fifth.—Also, for this, that the defendant, heretofore, to-wit, on the — day of ——, 1871, at, &c., subscribed for and became the owner of five other shares, of the par value of $100 each, of the capital stock of the South Branch Railway Company, and thereby and then and there became liable to pay, and promised to pay, to said plaintiff the amount due on said five shares, to-wit, $500.00, as and when required by said Company after its organization; and said plaintiff avers that said Company was fully organized under its charter on the 17th day of June, 1871 at, &c., of which the defendant, then and there had notice; and afterwards, to-wit, on the 28th day of May, 1873, at, &c., said company having commenced work on the construction of its road (by the order of its duly authorized board of directors), required that its stockholders should pay in on each share of their stock in said company ten per cent. on or before June 10, 1873; also ten per cent. on each share, thereafter to be paid monthly on or before the 10th day of each month until the subscriptions be paid up, and on, &c., at, &c., said defendant had notice of said requirement, and that the eight instalments which became payable under such requirement prior to the institution of this suit, amounted to eighty per cent—that is to say, $400 on his last named stock subscription, and had been required to be paid in by said company and board, yet said defendant failed to pay the same, or any part thereof, so that thereby, and by force of the statute, an action had accrued to plaintiff to have and demand of defendant said last mentioned $400.00, with ten per cent. interest on each of said instalments from the time it became payable as aforesaid; and being so liable, afterwards, to-wit on, &c., at, &c., said defendant, in consideration thereof, undertook and faithfully promised said plaintiff to pay it said last mentioned sum of $400.00 and interest whenever he should be thereunto afterwards requested.

Sixth.—And said plaintiff further says that heretofore, to-wit, on the — day of January, 1874, at, &c., the said defendant was further indebted to said plaintiff in the sum of $500.00 on account of subscription to the capital stock of

said company; and being so indebted, on, &c., at, &c., said defendant undertook and promised said plaintiff to pay it the said sum whenever thereunto afterwards requested.

"Nevertheless, the said defendant, not regarding his said several liabilities, agreements, promises and undertakings in the several counts mentioned, has failed to pay plaintiff said several sums of money, or any part thereof, or any of them or to perform and keep his said liabilities or agreements, or any of them, though often requested so to do, but the same to pay and perform and keep, said defendant hath hitherto refused, and still doth refuse, to the damage of the plaintiff $600.00; and, therefore, he sues, &c."

The defendant demurred to the declaration and each count thereof.

On May 5, 1876, the court entered an order removing the case to the circuit court of Lewis county, the judge of the circuit court of Hampshire being so situated, that it seemed to him improper to try the case. While the case was in the circuit court of Lewis county the following judgment was entered:

"This case having been on a former day of this term, submitted upon the demurrer to the declaration and to each count thereof and joinders therein, and the court having read the written argument of counsel is of opinion and doth consider for reasons stated in the written opinion of the court filed, that the demurrer to the whole declaration be overruled, that the demurrer to the first, second, fifth and sixth counts of the plaintiff's declaration be sustained, and to the third and fourth counts overruled. Leave will be given the plaintiff to amend its declaration in matter of substance if asked for, and if not leave will be given to the defendant for judgments to said first, second, fifth and sixth counts; leave to be given the defendant to plead third and fourth counts or if declined, with leave to the plaintiff to ask judgment thereon, and by consent of parties this cause is transferred to the circuit court of Hampshire county for further proceedings to be had therein." On April 16, 1879, the following order was entered in the case: "The demurrer of the defendant, heretofore filed and decided, to the declaration, only leaving and sustaining the third and fourth counts, on which the plaintiff is unwilling to risk his

case alone, he suffers a nonsuit as to those without fine, which fine the defendant waives, it is therefore considered by the court that the plaintiff be nonsuited as to said counts, and that defendant recover against said company his costs herein expended."

To the final judgment and to the judgment sustaining the demurrer to the first, second, fifth and sixth counts of the declaration the plaintiff obtained a writ of error.

The plaintiff did not amend its declaration according to the leave given. Finding that it could not make a different case from that stated in the counts, the demurrer to which had been sustained, on April 16, 1879, being unwilling to risk its case on the third and fourth counts alone in the language of the order "it suffered a nonsuit as to them without fine, which the defendant waived." Then follows the final order of the court: "It is therefore considered by the court, that the plaintiff be nonsuited as to said counts and that the defendant recover against said company his costs herein expended."

It was unnecessary for the final order to repeat the judgment of the court on the demurrer to the other four counts; that was made effectual by the final judgment giving costs against plaintiff. Now it is here insisted for defendant in error, that the said final judgment is but a nonsuit, and that as the mere costs in the suit will not give this court jurisdiction, the plaintiff has no right here to maintain this writ of error, as there is no judgment against him to his injury, he not being precluded from instituting another suit for the same cause of action. If it is a nonsuit in fact, as it is in terms, as to the third and fourth counts, it is true as insisted by counsel for defendant in error, that it is a nonsuit as to the whole case, as there is no such thing as a partial nonsuit; if a nonsuit is suffered, then, as the words import, there is no longer a suit pending; there is *no suit.* (*Chandler* v. *Parker*, 3 Esp. 76; *Pinner* v. *Edwards*, 6 Rand. 674; 7 Rob. Pr. 181–182.) This is not true as to a *retraxit*, which may be entered as to one or more counts in the declaration. It is said of a *retraxit* in *Pinner* v. *Edwards*, 6 Rand. 675 that in that case the plaintiff abandons his case, but "he goes further and admits that he has no cause of action; he entitles the de-

fendant to a judgment as beneficial to him, as if rendered on a general verdict in his favor. * * A nonsuit is not a final disposition of the cause, the plaintiff may commence it anew. A *retraxit* is a final disposition of it, and the plaintiff can not again commence his action."

In 7 Rob. Pr. 181–2 it is said: "In 38 Eliz. in an action of trover for goods and household stuff defendant pleaded as to one parcel, that they were fixed to his freehold in S.; as to another parcel, that plaintiff gave them to him at D., and as to the other part, not guilty. The plaintiff for the first part, entered *non vult ulterius prosequi*, and took issue upon the two others. After verdict for the plaintiff it was assigned as error, that what was entered was a nonsuit, and a nonsuit in part is nonsuit in all. But Anderson said: "It is a question if this be a nonsuit. The entry is *querens venit et gratis concessit*, that as to the goods mentioned in the first plea *non vult ulterius prosequi; ideo consideratum est quod nihil de iisdem versus* the defendant *fiat*, *et ille* and *pleg. in meseric.* and the defendant *eat inde sine die.* Periam said: "A nonsuit is when the plaintiff is demanded and doth not appear; but when he comes into court and saith *quod non vult ulterius prosequi* the same is a *retraxit.*" Nelson prothonotory said: "Nonsuit is upon default, but here the plaintiff appears and this is the usual form of a *retraxit.*"

Here the order shows, that the plaintiff was in court and stating he was unwilling to risk his case on the third and fourth counts alone, and that he suffers a nonsuit as to these two counts. Suppose the order had been, "and the plaintiff being solemnly called came not," therefore he here enters his *retraxit*, &c., could that be called a *retraxit*, because that word was used in the order? It will not be pretended that it would be a *retraxit*, because that can not be entered in the absence of the defendant, any more than a nonsuit can in his presence. It is manifest that the plaintiff did not intend to be nonsuited as to his whole case. What he intended, and what it was appropriate to do, was to declare, that he would not prosecute his suit on the third and fourth counts and let judgment be given against him on those two counts and on the demurrer formerly granted, so that he might at once apply for a writ of error to the judgment against him on

the four counts, as to which the demurrer had been sustained. Although the order said, he suffered a nonsuit as to these two counts, yet what it amounts to is, that he entered a *retraxit* as to these two counts. It would be extremely technical to hold, that because it was called a nonsuit, it was in fact so, when no nonsuit can be entered as to two counts in a declaration, and a *retraxit* might be, which was manifestly intended to be done; and to hold what was done as a nonsuit as to the two counts would be to hold that it was a nonsuit as to the whole case, which was clearly not intended. It will be regarded as a *retraxit* as to the third and fourth counts and as a judgment thereon as well as judgment on the demurrer against the plaintiff as to the first, second, fifth and sixth counts in the declaration. The judgment is a finality as to these two counts in the declaration.

Did the court err in sustaining the demurrer to the said four counts in the declaration? The only objection I can discover, that might be made to said counts and each of them is, that neither of them avers the payment on the shares of stock at the time of the subscription, which the statute requires. After fully considering this question this Court held in *Railroad* v. *Applegate*, 21 W. Va. 172, that a subscriber to the stock of a corporation can not escape his liability to pay his subscriptions, on the ground that he did not pay the sum required to be paid by the statute, at the time he subscribed. We think the said four counts are good, and that the court erred in sustaining the demurrer thereto.

So much of said order of April 16, 1879, as enters the *retraxit* of the plainttff on the third and fourth counts and gives judgment thereon for defendant is affirmed; and so much of said order as gives judgment on the demurrers to the first, second, fifth and sixth counts, and also the order of October 19, 1876, sustaining the demurrer to said counts, is reversed with costs to the plaintiff in error; and this case is remanded to the circuit court of Hampshire county with leave to defendant to plead and for trial to be had on the said four counts of said declaration.

AFFIRMED IN PART. REVERSED IN PART. REMANDED.

CHARLESTOWN.

26 702
36 631
26 702
37 482
26 702
43 764
26 702
56 488

CAMPBELL *v.* WYANT *et al.*

Submitted June 24, 1885.—Decided October 2, 1885.

1. Where a sheriff levies on sufficient personal property to pay the taxes on land, for which the levy was made, and the property is lost through his neglect or misconduct, for which the owner of the land is in no way responsible, the taxes so levied for are paid; and when after such levy and loss the land was returned delinquent and sold, and a deed made therefor, a court of equity will cancel such deed. (p. 708.)

2. *Quære.*—Is that part of sec. 25 of ch. 117, Acts 1872–3 constitutional, which declares: "No irregularity or over-charge as to a part of such taxes or purchase-money, nor payment of a part of such taxes, shall invalidate the sale except as to a part of the real estate so sold, proportioned to the whole thereof, as such part of the taxes or purchase-money is to the whole thereof?" (p. 708.)

The facts of the case are sufficiently stated in the opinion of the Court.

Leonard & Caldwell for appellant.

No appearance for appellee.

JOHNSON, PRESIDENT:

In 1877 the plaintiff filed his bill in the circuit court of Calhoun county to set aside a tax-deed. The bill alleges, that the plaintiff was the owner in fee of 535 acres of land in Lee district, Calhoun county; that the said land was assessed as 590 acres and was returned delinquent for the taxes of 1874; and that it was on November 22, 1875, by the sheriff of Calhoun county sold for said taxes. The bill charges, that said sale and deed are void for the following reasons, which appear of record in the clerk's office of the county court of Calhoun county: that said tract of land was improperly assessed on the land-books, being assessed as a tract of 590 acres, when it should have been assessed as a tract of 535; that the sheriff of Calhoun county did not return a proper list to the county court of said county of Calhoun for the year 1874;

that the distance and bearing of said land from the court-house was not given as required by law. A certified copy of the return of the land is exhibited, in which the "distance and bearing from court-house" is blank. The plaintiff further charges that said tract of land was never legally returned delinquent for the non-payment of the taxes due thereon for the year 1874; that no list was posted at the front door of the court-house of said county for the time required by law before the June term 1875 of the county court of said county; that there was a large amount of personal property, out of which the sheriff of said county could and ought to have made the taxes for the year 1874, and that said sheriff had levied on the said personal property, and received out of said property all of said taxes, and that the said sheriff fraudulently and falsely returned said tract of land delinquent for the non-payment of the said taxes.

He further claims that the said sheriff did not within ten days after receiving the list of lands set the same up at the front door of the court-house of the said county with the notice required by statute appended thereto; nor were the notices required by law posted at other places.

He further charges, that the sheriff did not within ten days after the completion of such sale return to the clerk's office a list of such sales with certificate and oath attached thereto, and that said clerk did not within twenty days thereafter make an accurate copy thereof in a book, and transmit the original to the Auditor. He prays said deed may be cancelled, and for general relief.

The plaintiff afterwards filed an amended bill, in which he alleges that in 1873 he conveyed said land to Ann B. Campbell, but it was not transferred to her on the assessor's books but still remained in his name, and that after this said tax-deed was obtained, and before this suit was brought, she conveyed said land back to him; that the value of said land is $2,600.00; that the farm was rented to David Carpenter for the year 1874; that there were at least fifty bushels of rent-corn on said farm for the year 1874, and that it was worth seventy-five cents per bushel; that the taxes on said land for for 1874 amounted to about $23.00, and that the sheriff of said county levied the said taxes on said rent-corn, which had been

raised and cropped on said land, and in that way collected the tax for the year 1874; that the return of said land was fraudulent, &c. He charges, that the defendant and others combined to purchase said land at said tax-sale, and agreed that they would not bid against each other, and then would divide the land among themselves. He charges that there was more than sufficient personal property on the land to pay the taxes, and that by the said levy they were paid. He repeats the prayer of the original bill.

The defendant, Wyant, answers both the original and amended bills, and specifically denies every allegation and charge, which tends to show, that there were any omissions or irregularities in the said sale for taxes, which can under the law be sufficient to set aside his deed.

Rufus Knotts, the deputy-sheriff of Calhoun county, in his deposition in the cause admits, that he had the tax-ticket for the year 1874 against said land in his possession for collection, and that in the fall of 1874 he levied the same on a crib of rent-corn on said land. With respect to that he says: "I was deputy-sheriff for James Barr, sheriff of Calhoun county, and acted as such from January, 1873, until June, 1875. I had a tax-bill for the year 1874 against William C. Campbell upon the land referred to. I collected $5.25 on said taxes, and the residue was not collected, and was returned delinquent; I did not make any effort to collect said taxes. I was on the land, I think, in December, 1874. I found a small crib of corn which I levied, and left in the care of David Carpenter, and before I had time to advertise and sell the corn, I saw Mr. Stump, who lived in the neighborhood, and spoke of wanting to buy corn, and that he had been talking to John C. Campbell in reference to the corn that was on the place. I told him that any arragement that *him* and Campbell would make in reference to the corn, so that the proceeds would be applied on the taxes at seventy-five cents a bushel would be satisfactory. I saw Mr. Stump after that. He told me that he saw Mr. Campbell and got some of that corn and would get some more. The next time, I think, that I saw him, he told me that he got to the amonnt of $5.25. He accounted to me for that amount which I applied on the taxes; the residue of the corn, if any, I do not know what became of it, David

Carpenter having removed from the place; no other property that I know of is liable for the taxes." (Objection was made to conversations with Stump.) He further stated: "The corn I considered very indifferent, it being damaged. I would suppose there were about thirty bushels of ears. I would not suppose it to be worth more than $8.00 to $10.00."

Knotts was recalled, and informed that "David Carpenter a witness for plaintiff in this case in answer to a question propounded to him in relation to a conversation had with you says: 'My understanding was with Mr. Knotts, when he came back he —— to me to let Mr. Stump have the corn. He was to take the corn and settle the tax. I told him I would not have anything to do with the corn. When he came back he told me that he had let Mr. Stump have the corn, and he was to settle the tax.' Now please state how this is, and what you did say on that occasion touching this matter, as near as you can recollect." Answer. "My arrangement with Mr. Stump was to see Mr. Campbell and with his permission *were* to get of the corn and account to me on the taxes of the land for the amount of corn he should get. My recollection is, I told Mr. Carpenter the arrangements I made with Stump in reference to the corn. I can not remember the exact language used." He denies, that he told Carpenter, that he had let Stump have the corn, and that Stump was to settle the taxes. Says that it is his recollection, that he was at the end of the crib of corn when levied on.

His deposition was re-taken. In this he says, that Stump accounted to him for the $5.25 in March or April, 1875, that he made no arrangement with any other person than Stump to get corn from the crib, and did not know that any person was getting corn there by arrangement with any other person whatever.

David Carpenter in his deposition says: "In the fall of 1874 the sheriff came and wanted the taxes for that year, and asked if Mr. Campbell had left the money with me to pay the taxes. I told him he had not. The sheriff said he must have his money for the taxes. I told him there was Mr. Campbell's corn, which was gathered and in the crib, and the raft of logs. The sheriff went down the creek and when he came back he said he would let Mr. Stump have the

corn to settle the tax. Mr. Stump came and got corn. I had nothing to do with it. My property on the land was worth at least $250.00. The raft was there yet when I left. There were upwards of fifty bushels of Mr. Campbell's corn.

He further said that Bushrod Hopkins come to his house in the fall of 1874 and told him he had an order from Mr. John C. Campbell for corn, he did not show witness the order. He told Hopkins that he had delivered the rent-corn to Mr. John C. Campbell and that he would have nothing more to do with it. He said further on cross-examination, he had raised on that farm in 1874, he supposed 300 bushels of ears of corn, and one third of it was rent-corn. When the levy was made, Campbell's rent-corn was all in the crib.

Stump in his deposition says: "I understood that Mr. Knotts had levied on corn on the land for the taxes of 1874, and I wanted to get some of the corn, so I went to Mr. Knotts and asked him if he had levied on the corn, and he told me that he had, and I asked him if I could get some of the corn, and I would pay him for it on the said taxes, and he told me I could," and I got corn to the amount of $5.25, at the rate of seventy-five cents per bushel, and I paid Mr. Knotts the $5.25 on the taxes on said land for the year 1874. I paid him on April 16, 1875; there were about thirty-five or fifty bushels of ears of corn left there after I got the corn.

John C. Campbell said in his deposition: "I had learned that the sheriff of Calhoun county had levied the said taxes on corn that was on the land, and which I knew was more than enough to pay said taxes, and I further learned from George G. Stump that the sheriff was disposing of said corn, and in answer to his inquiry I told him it was all right for him to purchase the corn of the sheriff, and to pay him for it to pay the taxes, and so I had reason to believe and did believe that the sheriff had collected said taxes." This witness says he is the husband of Ann B. Campbell and was her agent to look after the land in 1874.

Bushrod W. Hopkins in his deposition says: "I know there was corn there then, I purchased fifteen bushels of it from John C. Campbell. I found the corn in a crib close to David Carpenter's house. Had an order for the corn from

John C. Campbell. I had no trouble in getting the corn. Carpenter raised some objection, I can't state positively what my recollection is Carpenter said it was levied on, or he was notified by the sheriff not to let the corn go. Can't say whether Carpenter said he was notified not to let the corn go, or not to sell it; I think I took the corn away in December, 1874, or January, 1875. Had no conversation with Campbell about the ownership of the corn.

Seymour Rese in his deposition says, he got corn there twice, two bushels of ears each time. "David Carpenter measured the same, and I paid him for it. * I never had any conversation with John C. Campbell about the corn, and never paid for any."

The cause having been transferred to the circuit court of Lewis county by that court July 9, 1881, was heard on the pleadings, the original and amended bills, answers of defendant Wyant, and general replications thereto, exhibits, depositions of witnesses, &c., and the court was of opinion that so far as the plaintiff seeks relief by the total revocation of the deed of Stump, clerk, to defendant Wyant, the right upon the pleadings and proof is for Wyant. The court ascertains, that the whole tax on said tract of land for the year 1874 was $22.42, and that there was paid thereon before the land was returned delinquent $5.25; and the court was of opinion, that the payment of said $5.25 does invalidate the sale of the said tract of land, so sold to said Wyant, proportioned to the whole thereof as the said sum of $5.25 is to $22.42, and directed said Wyant to "convey by proper deed an undivided interest in said tract of land, as may have accrued to him by the deed of said clerk, equivalent to an undivided interest of 138 2-10 acres in the tract, as a tract of 590 acres," &c., and that Wyant pay the costs. Beyond this, relief was decreed the plaintiff.

From this decree W. C. Campbell appealed.

The right to sell land for taxes on an *ex parte* proceeding is an exception to the general rule: that no man shall be deprived of property without due process of law, and that due process of law is only upon a hearing of the parties in a court of competent jurisdiction. A grave constitutional question is therefore presented, whether a person's land shall be

sold for taxes not due thereon. Sec. 25 of ch. 117 of the Acts of 1872–3 authorized the action of the court in refusing to set aside the sale *in toto*, when it was ascertained by the court, that the land was sold for a greater amount of taxes than were due thereon. The provision is: "No irregularity or *overcharge* as to a part of such taxes or purchase-money, nor payment of a part of such taxes, shall invalidate the sale, except as to a part of the real estate so sold proportioned to the whole thereof, as such part of the taxes or purchase-money is to the whole thereof." Is this provision constitutional? Can a citizen be deprived of his property in this way? Can there be any valid sale of a person's land under such circumstances? Can the court make a contract for him, and say he shall only have a part thereof, and so the owner be deprived of what was improperly sold? As it is not necessary to the decision of this cause, that this constitutional question should be decided, we decline to consider it.

I think it is clearly proved in this record, that the sheriff of Calhoun county through his deputy, Rufus Knotts, levied on sufficient personal property on the premises to pay the taxes on the land for 1874, and that such levy was never released, and that therefore the taxes on said land for 1874 were paid. By statute the taxes may be levied on personal property, the same as executions may be levied, and of course the same rule as to such levy and the effect thereof must apply in the one case as in the other. Freeman in his excellent work on Executions sec. 269 says: "Levy upon personal property sufficient in value to satisfy the execution is frequently said to operate *per se* as an extinguishment and consequently as a satisfaction of the execution. In regard to the effect of such a levy there is no substantial conflict of opinion, though the judges have differed somewhat from one another in describing this effect and the means by which it is produced. None of the decisions assume that a levy produces any absolute satisfaction. It is a satisfaction *sub modo;* the levy must be fairly exhausted, before further proceedings can be taken, and while these proceedings are going on, the plaintiff can not have another execution, nor sue on the judgment, nor redeem lands under it. After the levy, if the sheriff wastes the property, or it is lost or destroyed

through his neglect or misconduct or that of the plaintiff, the satisfaction is absolute. If without any fault of the sheriff the levy does not produce proceeds sufficient to satisfy the execution, then the plaintiff is entitled to proceed for so much as remains unpaid, as if no levy had been made. * * Where (however) the property is never taken from the presence of the defendant, or where after being so taken it is restored to him at his request, or by some act for which he is responsible, or in which he acquiesces, the levy does not operate as a satisfaction, so far at least as his rights are concerned." These propositions are sustained by abundant authority cited by Freeman.

Here there is no proof, that the plaintiff, William C. Campbell or Ann B. Campbell made any arrangement with the sheriff, by which the corn was to be released from the levy, nor did they or either of them get the benefit of said property, but it was except as to the $5.25 wholly lost to them, and according to the authorities we have cited the property being shown to have been of sufficient value to pay the taxes, the said taxes were paid, and the land was improperly returned delinquent. There was much evidence taken to show there was abundant personal property on said land in possession of the tenant to have paid the taxes. The proof is ample to show, that the personal property in the hands of the tenant was sufficient to have many times over paid said taxes, and that said property was there when the levy was made on the crib of corn. But although it is denied in the answer, that such property was there, and that was made an issue in the cause, yet it was an immaterial issue, because a tax-deed will not in our State be set aside, because there was personal property on the land liable for the taxes, which was not, when it ought to have been, taken by the sheriff to pay the same. The taxes must be actually paid by the owner of the land or some other person or else by distress under chapter 30 of the Code; or they may be paid by the appropriation of sufficient personal property, for the loss of which the sheriff is chargeable, as we have seen. In some states land can not be returned delinquent and sold, if there be sufficient personal property on the land to pay the taxes, that is, by force of their statutes. (Blackwell on Tax Titles, chapter IX.) Our statute is different.

For the error we have pointed out the decree of the circuit court of Lewis county is reversed with costs to the appellant against the appellee Wm. T. Wyant; and the said tax-deed is cancelled and annulled, and a writ of possession awarded the plaintiff, and the plaintiff must recover his costs against said Wm. T. Wyant in the circuit court expended.

REVERSED.

FALL-SPECIAL TERM.

CHARLESTON.

HANDY *et al. v.* SCOTT, BAKER & Co. *et al.*

Submitted June 17, 1885.—Decided Nov. 14, 1885.

1. An appellate court will not reverse a decree at the instance of a party not prejudiced by it. (p. 717.)

2. A paper purporting to be an answer copied into the transcript of the record and certified by the clerk as having been filed in the court below after the cause had been set for hearing, but which was not filed by any order of court and is not referred to or recognized in any order or decree entered in the cause, is not a part of the record and will not be considered by the appellate court. (p. 718.)

3. A non-resident party, against whom a decree has been rendered upon order of publication, must proceed in the manner prescribed by the statute for the review of such decree and can not in the first instance appeal therefrom to this Court. (p. 718.)

4. Where questions purely of fact are referred to a commissioner to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight and should be sustained, unless it plainly appears that they are not warranted by any reasonable view of the evidence. This rule operates with peculiar force in an appellate court, where the findings of the commissioner have been approved and sustained by the decree of the inferior court. (p. 718.)

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The facts of the case are sufficiently stated in the opinion of the Court.

D. D. Johnson for appellants.

W. S. Sands and *P. W. Morris* for appellees.

SNIDER, JUDGE:

Prior to September 13, 1856, Robert Porter had been engaged in the mercantile business carrying on five stores, two in the town of Harrisville and one at Schumla in Ritchie county, one at Hebron in Pleasants county and one at Saltille in the State of Indiana. Before said date he became embarrassed and sold all the goods and merchandise in said several stores except a remnant in one of the stores at Harrisville. On the said 13th day of September, 1856, he made an assignment to J. A. Lowther, Noah Rexroad and Addison Rexroad, trustees, of all the notes, accounts and evidences of debt of every kind due him at said several stores prior to the time he had sold the stores; also the remnant of goods at the Harrisville store, some live stock, farming utensils and household and kitchen furniture, &c., in trust, after paying costs of executing the trust, to pay all the debts due from said Porter in the order following: *First*, all such debts as was then in judgment and execution, and second, all other debts *pro rata*. A schedule of said debts was made a part of the assignment and among others were the following debts: "Scott, Baker & Co., amount, not known, James Kent, Santee & Co., amount not known, assignees of Reed Bros. & Co., amount not known, J. M. Ashton, $106.37," &c. There was nothing on the face of the assignment to indicate the character of any of the debts, or whether or not any of them were judgments or executions.

By two separate deeds of the same date the said Porter conveyed to said trustees a tract of land in Ritchie county and several lots in the town of Harrisville upon the like trust and for the same purposes mentioned in the aforesaid assignment. The assignment and trust-deeds were duly recorded in Ritchie county September 16, 1856.

Soon after said assignment Porter left the State and died insolvent. J. A. Lowther also died intestate.

On December 27, 1867, Henry Handy & Co. instituted their suit in the circuit court of Ritchie county against Scott, Baker & Co. and the other creditors of Porter mentioned in said schedule, the personal representatives of Porter and Lowther, deceased, and Noah and Addison Rexroad surviving trustees of Porter. They filed their bill at January rules, 1868, in which they aver that the notes, accounts and other evidences of debt and all the property mentioned in the aforesaid assignment and deeds were delivered to and passed into the possession of said trustees and that they assumed the execution of said trusts; that the assets of said trust were more than sufficient to pay off all the debts mentioned in said schedule; that in addition thereto there was sufficient to pay off the plaintiffs' judgment for $433.66 recovered by them against Porter, June 19, 1856, in the county court of Ritchie county, and that said trustees realized from said trust assets a sum sufficient to pay off said debts and their judgment; that said trustees have converted said assets to their own use and refuse to pay the plaintiffs' judgment, and they pray that said trustees may be required to discover on oath their transactions relating to said trust and that they may have general relief, &c.

May 21, 1868, an order was made referring the cause to a commissioner to ascertain and report the doings of the trustees and the debts on which payments had been made, &c.

Nothing further was done until January 12, 1872, when an order was entered showing that the plaintiffs moved the court to dismiss the cause, and that Skinner, Ralston & Co., claiming to be creditors of Porter, were admitted as plaintiffs and the cause was ordered to be thereafter proceeded in their names and at their costs.

The next proceeding in the cause was an order made April 23, 1878, showing that the plaintiffs withdrew their motion to dismiss, and leave was given to Skinner, Ralston & Co. to become parties-plaintiffs upon filing a proper petition setting forth their interest in the cause within sixty days.

Upon the special report of the commissioner a rule was awarded by the court, October 28, 1878, against the defendant Noah Rexroad to show cause why he should not be attached for refusing to appear and testify before the com-

missioner; and on the following day an order was made requiring the said defendant to file a proper answer to the plaintiffs' bill within sixty days and to appear before the commissioner and answer interrogatories in regard to the matters referred to the commissioner.

On April 28, 1879, Noah Rexroad filed his demurrer and answer, and the plaintiffs took time to except or reply thereto. The defendant by his answer, denies that the notes, accounts and evidences of debts mentioned in the assignment of Porter, or any part thereof ever came into possession of himself or his co-trustees; that the trustees when they were informed of the assignment peremptorily refused to have anything to do with the matter, but at the urgent solicitation of Poter and his friends they consented to act so far as to take charge and dispose of the property assigned and conveyed to them other than the notes, accounts and other evidences of debts; that the said Porter then made an arrangement with John C. French, his former clerk and assistant in his business, to take charge of and collect said evidences of debt and account for and pay over the same according to the terms of the said assignment; that said French did take charge of said evidences of debt and collected all that were collectable and paid the same over to Wm. M. Patton sheriff of Ritchie county in satisfaction of executions held by him against Porter, and that no part of said evidences of debts or the proceeds thereof ever came into the hands of the defendant or his co-trustees. The defendant then proceeds to state the manner in which he executed the trust in regard to the property which came into his hands as trustee, he being the only trustee that acted in the matter. He sold all said property including the real estate and realized therefrom less than $1,200.00 as he verily belives, that he paid all of said money to Wm. M. Patton, sheriff, on account of executions which were in his hands against Porter before and at the time the assignment was made and took his receipts for the same and placed them in a trunk in the store of respondant and one Kinney in the town of Harrisville where they remaind until the store was broken open by the soldiers along with the "Jones raid" on May 7, 1863, and said trunk was rifled and said receipts and other papers taken away or distroyed, and he has since been

unable to find any of them or the memoranda of his trust transactions which were also in said trunk and taken or destroyed at the same time. That after this suit was instituted he paid to the plaintiffs, on May 28, 1870, $233.66 and took from their attorney a receipt in full satisfaction of their said claim with an agreement that this suit should be dismissed by the plaintiffs. He avers that he made this payment not because he was liable for anything as trustee, but as he had lost all his vouchers he was advised to do so rather than incur the trouble and expense of litigation and the risk of being able to obtain justice in the absence of his vouchers.

The plaintiffs and defendant Noah Rexroad took many depositions, and on October 29, 1879, the commissioner filed his report which on the motion of the plaintiffs was recommitted with leave to the parties to take further proof. On April 26, 1880, the commissioner filed his second report in which he says: After reviewing the testimony and maturely considering the same, he sees no reasons for changing his former report, and therefore he submits it as his report in the cause. The material parts of said report are as follows:

"Your commissioner further reports that after hearing the evidence in the cause and duly considering the same, he finds—

"First.—That none of the claims mentioned in the assignment made by Robert Porter to the defendants, Addison Rexroad, John A. Lowther and Noah Rexroad, trustees, were ever received by them, or either of them, nor were any of them collected by the said trustees, or either of them, but that said claims were in the possession of John C. French, by whom some were collected, and the proceeds paid over to the then sheriff, William M. Patton, to be applied to executions then in his hands against said Robert Porter.

"There is nothing to show what particular claims were collected nor the amount collected, save that it is in evidence that said French paid to the said Patton about $2.300.00; nor can it be shown what claims are still uncollected, as all the papers, books and accounts connected with the estate of said Porter were lost and destroyed during a raid made through this country during the late war.

"Second.—Your commissioner further reports that Noah

Rexroad is the only one of the trustees who received any thing belonging to the estate or transacted any business connected with it, and that said Noah Rexroad received of one Thomas Randall, administrator of H. H. Smith, in whose hands claims belonging to what was known as the Indiana store were placed for collection, $130.57.

"Third.—Your commissioner further reports that the personal property of said Porter that came into the hands of Noah Rexroad, trustee, consisted of two horses, one wagon, some harness, two cows and one heifer, all of which were sold by said trustee, and amounted in the aggregate to $150.00. To whom sold not shown, except one horse for $47.00 to one Hammer.

"Fourth.—Your commissioner further reports as to anything received by said trustees from other sources than the debts and claims as particularly mentioned in said assignment, that Noah Rexroad received from Dr. M. S. Hall about $135.00, being the amount of a note for $75.00, with its interest, and from Dr. J. M. Lathrop about $135.00, being the amount of a note for $75.00, with its interest.

"Fifth.—Your commissioner further reports that the real estate that came into the hands of said trustee, Noah Rexroad, and by him sold, was as follows: What was known as the Blackshire farm, containing 154 acres, to one Jeremiah Snodgrass for $500.00; lots No. 86, 87 and 88 in the town of Harrisville to Barcus Ayres for $57.40; lot No. 92 to Allen and Catlett for $25.00.

"Sixth.—Your commissioner further reports that all the foregoing amounts mentioned as received by said trustee Noah Rexroad, amounting in the aggregate to $1,366.06, were paid to William M. Patton, then sheriff, to be applied to the numerous executions then in his hands against the said Porter; that the trustee Noah Rexroad paid to Handy & Bro. $233.66, thereby showing that he has paid more for the estate than he received; and your commissioner finds nothing in the hands of the said Noah Rexroad, trustee, and his co-trustees, for distribution."

The plaintiffs and John L. Erringer trustee for Reed Brothers & Co., excepted to said report as follows:

"First.—The commissioner has erred in his finding noted

in his original report as '1st,' in that he finds that none of the claims mentioned in the assignment of Robert Porter to Noah Rexroad and others, trustees, were received or collected by them, as the evidence plainly proves that one John C. French took said outstanding claims and collected at least $2,300.00 of said claims, and that he *was in fact* and must be so *regarded in law* as acting for the said Noah Rexroad, trustee, who undertook the execution of said trust.

"Second.—The commissioner erred in his finding noted as '2nd,' in that he charges said Noah Rexroad with having received from the Indiana store only $130.57, the proof being that he received over $700.00, and the commissioner ought to have found accordingly.

"Third.—The commissioner erred in his finding noted '3d,' in that he finds that the property therein mentioned, amounting in value to $150.00, was the only property that came to the hands of said Noah Rexroad, trustee. The evidence of Patton shows that he also sold hogs to the value of $30.00, and the other property mentioned in the assignment is not properly accounted for.

"Fourth.—The commissioner erred in his finding noted '6th,' in that he finds that the said Noah Rexroad, trustee, had paid over to William M. Patton, sheriff, all the moneys he had collected, as the evidence does not justify the commissioner in arriving at that conclusion.

"Fifth.—The commissioner erred further in his finding noted '6th,' in that he finds that there is nothing in the hands of said Rexroad, trustee, for distribution. The evidence shows and the commissioner has found that he received:

From real estate	$582 40
And from personal property	783 66
and he should be charged with	$1,366 06
the sum collected by French.	$2,300 06

"It is not shown that there were leviable executions unsatisfied in the hands of the sheriff to absorb this fund. Such executions could not be a lien upon the proceeds of the real estate. Rexroad paid to Scott, Baker & Co., $390.92 upon a judgment rendered subsequent to the assignment, and which was certainly no lien and were not beneficiaries under the trust, therefore the commissioner erred in not finding that

the said Noah Rexroad, trustee, was still liable for all the funds shown to have come into his hands, and the hands of French for him, according to the conditions of the trust."

On June 22, 1881, the cause was heard on the bill, former orders, answer of Noah Rexroad, replication thereto, depositions and proofs, the report of the commissioner and the exceptions thereto, and the court entered a decree overruling the exceptions to the commissioner's report and confirming said report and dismissing the plaintiff's bill with costs. From this decree, on the petition of the plaintiffs and said John L. Erringer, trustee &c., an appeal was allowed by a judge of this Court.

We are asked by the appellee, Noah Rexroad, to dismiss this appeal for the reason that neither of the appellants are entitled to prosecute it. The said appellee has filed in the record a receipt signed by an attorney for the plaintiffs for $233.66 "in full of all dues and demands against Robert Porter, deceased, for which there is now pending a suit against N. Rexroad and others, trustees." This receipt is dated May 28, 1870. The appellee proves that he paid the amount mentioned in said receipt through the attorney who brought this suit and the commissioner reports that said payment was in fact made. No attempt was made in the court below to show that said receipt was not genuine or that the attorney who gave it was not duly authorized to do so. Nor was the report of the commissioner excepted to because it reported that such payment had been made to the plaintiffs. It seems to me, therefore, that the plaintiffs have no further interest in this suit and that they have no interest in prosecuting this appeal; they were certainly not prejudiced by the decree appealed from and as to them the decree should be affirmed. *Clarke* v. *Johnson*, 15 W. Va. 804.

As to the only other appellant, John L. Erringer, surviving trustee of Reed Bros. & Co., the record shows that the "assignees of Reed Bros. & Co.," named in the plaintiff's bill as defendants, are non-residents of this State and that they were proceeded against by order of publication, and the orders and decrees entered against them as such without any appearance by them in the circuit court. John L. Erringer, surviving trustee, &c. was not by name made a party to the

bill. There is copied into the transcript of the record a paper purporting to be the answer of John L. Erringer, surviving trustee of Reed Bros. & Co., and a memorandum by the clerk that the same was filed June 19, 1878. But there is no order of the court filing said alleged answer nor any reference to or recognition of it by or in any order or decree in the cause. According to a well settled rule of this Court the said supposed answer can not be regarded as a part of the record or be considered by the Court.—*Park* v. *Petroleum Company*, 25 W. Va. 108; *Hilleary* v. *Johnson*, 11 *Id.* 113.

If it be conceded that the making of the "assignees of Reed Bros. & Co." defendants in the plaintiff's bill, is sufficient to make John L. Erringer trustee for Reed Bros. & Co., a party defendant in this cause, still he must take the same position occupied by the assignees of Reed Bros. & Co. and be therefore treated as a non-resident defendant against whom all the orders and decrees in the cause were entered on order of publication. Being such non-resident defendant and having failed to answer or appear in the court below he is not in a situation to appeal from any decree entered in the cause. It is well settled that a non-resident defendant against whom a decree has been rendered upon publication is confined to the remedy prescribed by the statute and that he can not in the first instance appeal from such decree. *Vance* v. *Snyder*, 6 W. Va. 24; *Meadows* v. *Justice*, *Id.* 198; *Lenows* v. *Lenow*, 8 Grat. 349.

But looking to the merits of this cause the decree dismissing the plaintiff's bill was plainly right. The matters referred to the commissioner to report upon were purely questions of fact dependent upon a large mass of contradictory, parol testimony. In such cases the findings of the commissioner, while not as conclusive as the verdict of a jury, are allowed great weight and must be sustained unless it plainly appears that they are not warranted upon any reasonable view of the evidence. *Boyd & Co.* v. *Gunnison*, 14 W. Va. 1–19, and cases cited; *Graham* v. *Graham*, 21 *Id.* 698.

This rule operates with peculiar force in the appellate court where the report of the findings of the commissioner has been approved and sustained by the lower court. In this

cause the report was re-committed on the motion of the plaintiffs in order that they might take further testimony. They took no further testimony and the commissioner after reviewing the testimony before taken and maturely considering the same found no reason to alter his former findings. After all this had been done the court overruled the exceptions to the report and confirmed the same. I have carefully examined all the evidence on which the comissioner founds his report and while it is contradictory in some particulars in my opinion the findings of the commissioner are fully sustained by the great preponderance of the evidence. But if the true result of the evidence were doubtful, this Court would not reverse the decree sustaining the report. It is not the province of the appellate court to review masses of contradictory testimony, upon which any conclusion must be to a great extent unsatisfactory and conjectural, for the purpose of reversing a decree of the inferior court sustaining the report of a commissioner based upon such testimony. If conjectures as to the result of parol testimony have to be made in order to dispose of the case, they should be made by the commissioner and the court below, and when made they should not be disturbed by the appellate court which has not the same opportunities for weighing such testimony. It is only when the report and the decree are plainly against the evidence that the appellate court can interfere in such case.

For the foregoing reasons, I am of opinion that the decree of the circuit court should be affirmed.

AFFIRMED

CHARLESTON.

HAINES v. COCHRAN BROS.

Submitted June 19, 1885.—Decided November 14, 1885.

(*JOHNSON, JUDGE, Absent.)

1. To maintain *trover* the plaintiff must show a conversion of personal property by the defendant, and that he had at the time of

*Related to some of the parties.

the conversion a general or special right of property in the thing converted and also the possession or a right to the immediate possession thereof. (p. 723.)

2. In such action a conversion may be proved in three ways: *first*, by a tortious taking; *second*, by any use or appropriation to the use of the defendant indicating a claim of right in opposition of that of the plaintiff or owner; and *third*, by a refusal to deliver possession to the owner on demand. (p. 723.)

3. When the action is by a buyer against the seller, and the contract is that the goods shall be paid for on delivery, the plaintiff can not maintain the action, if he fails to prove that he has paid the full price before the action is commenced. (p. 725.)

4. But if the goods are delivered at the place appointed by the contract of sale, and the defendant claims to hold possession only until the purchase-money is paid, the plaintiff will be entitled to recover, if he proves on the trial that such claim of the defendant is unfounded, and that he had in fact paid the full price, before the action was commenced. (p. 725.)

5. Where the plaintiff had two distinct and separate contracts for the delivery of staves at a specified place, to be paid for on delivery, and the plaintiff claims in his declaration the value of all the staves in both contracts, but the proof shows that he had paid for the staves delivered under one contract only, he may recover for the staves delivered under that contract, although he is not entitled to recover for the staves embraced in the other. (p. 726.)

6. In this action the court properly instructed the jury, that if they believed from the evidence that the plaintiff had purchased and paid for the staves in the declaration mentioned, that the defendant delivered them to the plaintiff and afterwards came into possession of them without the consent of the plaintiff, the plaintiff was entitled to recover. (p. 726.)

7. The giving of a trust-deed on the property sought to be recovered which requires the plaintiff to deliver the property to the trustee, does not take from the plaintiff the right to recover from a person not claiming under such deed. (p. 727.)

The facts of the case are fully stated in the opinion of the Court.

John A. Hutchinson and *Dave D. Johnson* for plaintiff in error.

W. P. Hubbard and *H. M. Russell* for defendant in error.

SNYDER, JUDGE:

Writ of error to a judgment of the circuit court of Pleasants county rendered June 16, 1883, in an action of *trover* brought by Simpson Jones and Ralph Haines, partners as Jones & Haines against John, Park and Joseph Cochran, partners as Cochran Brothers, for the conversion of 80,000 oil barrel staves of the value of $2,000.00. There was a trial by jury and a verdict in favor of the plaintiffs for $699.35, on which the said judgment was rendered. The defendants have brought this writ of error.

The plaintiffs read in evidence a written contract between themselves and the defendant, John Cochran, dated May 12, 1879, wherein they agreed to purchase from Cochran 100,000 staves, more or less, at $13.50 per thousand, to be delivered on the bank of the Ohio river by November 1, 1879, to be paid for as follows: $9.00 per thousand at the time of bucking the staves in the woods and the balance when delivered on the bank of the river by Cochran.

They then introduced evidence tending to prove that under said contract the defendants delivered on the bank of the Ohio river 117,000 staves, that of these staves they loaded on their barge and shipped to Pittsburgh in the fall of 1879, 81,500; that in January 1880, they made a second contract with John Cochran for 50,000 additional staves to be paid for as in the first contract; that this second contract was verbal and not in writing; that the said 81,500 staves were all that they got under both contracts; that at the time the second contract was made they paid on it $200.00, and accepted an order drawn by Cochran for $125.00; that they never settled for all the staves on both contracts, but had paid in full for the 117,000 on the first contract; that some of the staves on the second contract were delivered on the bank of the river and were ricked up separately from the other staves; that defendants sent a written notice to Robert Patterson, the attorney of the plaintiffs, and he went to the stave-yard on the river and the defendants then offered to deliver the balance of the staves due the plaintiffs, provided the balance due on them was paid and they showed him one or two large ricks of staves which they said belonged to the plaintiffs—this was in June, 1880; that at that time and place the staves were

worth $20.00 per thousand loaded on the barge and it would cost about thirty cents per thousand to load them on the barge.

The defendants introduced in evidence two trust-deeds given by the plaintiffs, the one dated February 9, 1877, and the other May 5, 1879, conveying real estate of the plaintiffs to secure two debts due from them of $921.00 and $600.00, respectively, and then offered evidence tending to prove that the plaintiffs were not in good credit and were in failing circumstances; also evidence tending to contradict that of the plaintiffs in many respects, especially in regard to the delivery of any staves other than those taken away in the barge by the plaintiffs and tending to prove that there never was any other than the written contract between the parties, and that the plaintiffs were indebted on that contract between $70.00 and $100.00, which they refused to pay; that they had the staves on the yard and told Patterson, the plaintiff's attorney, they would deliver them to the plaintiffs when the balance due on them was paid.

Robert Patterson, the attorney for the plaintiff, who had testified that he was acting as such at the time he received from the defendant the written notice hereinbefore referred to being re-called by the plaintiffs testified, that when he was down at the stave-yard in June, 1880, he demanded the difference between the 117,000 staves and what he understood the plaintiffs had taken to Pittsburg.

After the evidence had been closed the defendants asked the court to give to the jury seven instructions, numbered from one to seven. The court gave the second, third, fourth, fifth, and a portion of the first and refused to give the others, but in lieu of the defendants, seventh the court gave another instruction which may be designated as No. 8. To which several rulings of the court in giving the said instruction No. 8 and refusing to give Nos. 6 and 7, and No. 1 as asked, the defendants excepted.

The said first instruction as asked is as follows, the part refused being in italics:

"That the plaintiffs have no right to recover in this action unless they show that on the 25th day of June, 1880, (the time this suit was brought) they had the right of prop-

erty in the said 80,000 staves, or any part they may show themselves entitled to, and also had the right to the possession of said staves, or part thereof, according to the terms of the alleged contract between them and John Cochran, *and that the defendants did actually convert the specific staves claimed in this action by the plaintiffs to their own use after the plaintiffs had made a demand upon them within a reasonable time before this action was brought, otherwise the verdict must be for the defendants.*" And the defendants instruction, No. 7, refused by the court and No. 8, given by it are as follows:

Instruction No. 7.—"That before the plaintiffs will be entitled to recover in this action upon the facts and circumstances proven, it is the duty of the plaintiffs to prove to the jury by evidence a demand and refusal on the part of the defendants, at any day prior to the commencement of this action, and also to show that the defendants had it within their power to give up the staves.

Instruction No. 8.—"That the jury are instructed that if they believe from the evidence that the plaintiffs purchased of John Cochran the staves and property in the declaration mentioned, and that they paid him for the same, and that said property was delivered to them, and afterwards came into the possession of the defendants, without the consent of the plaintiffs, then the plaintiffs are entitled to recover in this action so much damage as the jury may from the evidence be satisfied the plaintiffs have sustained."

To maintain *trover* the plaintiff must show a conversion of personal property by the defendant and that the plaintiff had at the time of the conversion a right of property in the thing converted and also the possession or right to the immediate possession thereof. This right to the possession must be absolute and unconditional. It is essential that the plaintiff should have the possessory title—that is, the right to the immediate possession of the goods; but this possessory title may be either general or special. Possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action against a wrong-doer; for the possession is *prima facie* evidence of property. 3 Rob. Pr. 448.

A converson may be proved in three ways: First.—By a

tortious taking. Second.—By any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the rights of the owner. Third.—By a refusal to give up the possession to the owner on demand. When there is proof of the first or second, there is no occasion for proof of the third. In other words, demand and refusal, being only evidence of conversion, need not be shown when there is sufficient proof of actual conversion. *Newsum* v. *Newsum*, 1 Leigh 86.

The object of the demand is to afford the person in possession an opportunity to deliver the property up without costs if he have no claim. *Jones* v. *Dugan*, 1 McCord 429. Therefore where the person in possession has only a special property in the goods, such as a bailee, a demand made after the goods have passed out of his possession and when he could not deliver them would not render his refusal to do so a conversion or evidence of a conversion. But where the person in possession does not claim to hold for another, then it is immaterial whether the demand is made before or after he has parted with the possession; for, if the goods have been disposed of, a demand will be considered as giving an opportunity of making satisfaction therefor and not as affirming any pretended sale of them. *Thomas* v. *Sherley*, 1 Esp. 31.

In the case at bar there is no pretense that the defendants had at any time held the staves as bailees. Until they delivered them to the plaintiffs, if they did deliver them, they held the staves as their own property, and if after such delivery they re-possessed themselves of them, that act constituted a conversion. The taking being without the consent of the plaintiffs was tortious and therefore no demand before suit was necessary. It is only where the property was rightfully in the possession of the defendant subject to the order of the plaintiff that a demand is required before the action.

According to these principles it is apparent that the portion of the first instruction which the court refused to give to the jury was properly excluded. It explicitly told the jury that they must find that the conversion was made by the defendants "*after* the plaintiff had made a demand upon them." If the defendants, not claiming as bailees or as holders for the plaintiffs, were in possession of the staves such possession

was tortious and the plaintiffs were entitled to their action without a demand upon the defendants, either before or after the conversion.

It is very true, this being an action by the buyers against the sellers of goods, that in order to maintain their action the plaintiffs should satisfy the jury that the staves had been delivered to the plaintiffs. The sale in this case being for cash at or before the delivery, there can be no question that the plaintiffs could not maintain their action until the full payment of the contract price and the court so expressly instructed the jury. *Owens* v. *Weedman*, 82 Ill. 409. But whether the staves had been paid for and there had been in fact a delivery of them by the defendants to the plaintiffs, were questions for the jury. There was evidence tending to prove both the delivery and the payment of the agreed price and the jury having found for the plaintiffs on these questions, the court has no power to interfere unless there is a clear absence of evidence to sustain the findings of the jury.

It is claimed, however, for the defendants, the plaintiffs in error, that as the declaration avers the conversion of 80,000 staves and does not distinguish them by any marks, or discriminate between those due on the first and the second contract, the plaintiffs can not recover unless the proofs warranted the jury in finding that they had complied with the terms of and were entitled to recover upon both contracts. I do not think this is the proper view of this case. The evidence tends to show that there were two distinct and separate contracts, the one for 100,000 staves more or less on which 117,000 staves were delivered and paid for, and the other for 50,000 staves which were not paid for in full. Now it is certain that the plaintiffs were not entitled to recover for any of the staves embraced in the second contract because they had not paid for them, and if it appeared from the verdict that the jury necessarily included any part of the staves due on the second contract, this Court would be compelled to set aside the verdict and reverse the judgment of the court below. But upon looking into the record, we find that of the 117,000 staves in the first contract the plaintiffs got 81,500, leaving a balance of 35,500. These the evidence tends to prove were worth $19.70 per thousand, that is, $20.00 per thousand less

thirty cents for loading them on barges. This 35,500 at $19.70 would make precisely $699.35, the sum found by the verdict of the jury. It is therefore apparent that the jury did not include any part of the staves of the second contract in their verdict. It is, at least, not shown by the record that the jury necessarily included any part of the staves of the second contract in their verdict. The part of the defendants' first instruction given by the court distinctly told the jury that the plaintiffs could not recover unless they had the right of property and the possession or the right of possession in the 80,000 staves, *or any part thereof.* This was equivalent to saying to the jury, at the instance of the defendants, that they might find part of the staves for the plaintiffs, although the plaintiffs might not be entitled to recover for the whole of the staves for which the action has been brought. This instruction, I think was correct according to the evidence in this case. It appeared from the evidence that there had been two distinct and separate contracts, and, I think, the plaintiffs had a right to recover the value of the staves converted by the defendants under the one contract while they might not have shown themselves entitled to recover under the other. If the evidence had shown that there had been but a single contract and the 80,000 staves sued for had been an entirety and not severable, then the question would have arisen whether in this form of action the plaintiffs could have recovered any part of the staves without showing that they had fully complied with the whole contract and were entitled to recover for all the staves embraced in it. This question does not arise in this case and is not decided.

Instruction No. 7 was properly refused for the reason, if for no other, that it told the jury the plaintiffs could not recover in this action until they had proven that they not only had demanded the staves before action brought, but "that the defendants had it in their power to give up the staves." This latter requirement was clearly irrelevant and improper under the facts and circumstances of this case as hereinbefore shown.

Instruction No. 8, given to the jury by the court properly stated the law according to the evidence in this case. If the jury should find from the evidence that the plaintiffs had paid

for the staves and the defendants had delivered them to the plaintiffs, then if the defendants afterwards took possession of them, such taking without the consent of the plaintiffs would be tortious and no demand would be necessary to entitle the plaintiffs to recover. This is what the instruction was in effect and substance.

The controversy was mainly whether or not the plaintiffs had paid for the staves, the plaintiffs claiming that they had and the defendants that they had not. The staves having been delivered at the place provided for in the contract, they became the property of the plaintiffs as soon as they paid for them. The defendants were entitled to hold them until they were paid for but no longer. If, however, the defendants continued to hold them after such delivery at the place contracted for upon a false claim for a balance of the price which was not due, they did not thereby defeat the right of the plaintiffs to recover in this action. The question whether the plaintiffs had paid for the staves and whether the claim under which the defendants asserted the right to the possession of the staves was a false or a valid claim was for the jury to pass upon, and having been fairly submitted to them and they having found for the plaintiffs, the court properly sustained that finding.

The propriety of refusing the sixth instruction of the defendants will be hereafter shown.

Some of the defendants' instructions, which were given by the court did not, in my opinion, correctly state the law. But as these instructions were more favorable to the defendants than they should have been, and having been given at their instance, they were not prejudiced by them, and therefore said instructions do not entitle the defendants to a reversal of the judgment of the circuit court.

After the parties had introduced the evidence hereinbefore referred to, the defendants offered to read to the jury a trust-deed from the defendants to W. W. Hall, trustee, dated September 22, 1879, by which the plaintiffs conveyed to the said trustee "all the oil barrel staves bought or handled by them between the first day of July, 1879 and July 1, 1880" to secure the Pittsburgh Stave Company, sixty-six per cent. of the contract price to be paid by said company to the plaintiffs

for said staves, according to the terms of a certain written contract therein referred to, made between the plaintiffs and the said company. The plaintiffs objected to said trust-deed as evidence, and the court sustained the objection and excluded said deed from the jury. The defendants excepted to said action of the court, and insist that the same was error. It was proven that the staves sought to be recovered in this action were covered by said trust-deed, but the written contract therein referred to was not read or offered in evidence.

Without considering the questions whether or not said deed could have been properly admitted in evidence without accompanying it with the written contract therein referred to, or whether by said conveyance the title to staves not then in existence but to be thereafter bought and handled passed to the trustee, there can, it seems to me be no question that said deed was properly excluded from the jury. By its terms the plaintiffs bind themselves "to sell and deliver said staves to said Pittsburg Stave Company." Before the plaintiffs could make such delivery they must themselves obtain posession of the staves. The deed necessarily implied that they should do so. But if the contention of the defendants, that the making of said deed deprived them of the right to obtain possession of the staves, is sustained then the deed destroys itself—it requires the plaintiffs to deliver the staves and at the same time takes from them according to the defendants' interpretation the power to do so, for they can not deliver the staves unless they can first get the possession of them themselves. But under any reasonable interpretation of this deed the plaintiffs would be entitled to hold or recover the possession of the staves as against the defendants or any one not claiming under the trustee or beneficiaries in the deed.—*Luse* v. *Jones*, 39 N. J. Law 707; *Parkhurst* v. *Jacobs*, 17 Mich. 302.

The defendants' sixth instruction was founded on the effect that should be given to this trust-deed, and as the deed was properly excluded from the jury, the instruction was immeterial and foreign to any evidence in the case, and was therefore rightfully excluded.

I have now considered all the errors assigned by the plaintiffs in error, except the one overruling their motion for a new

trial. It has already been shown that there was no error to their prejudice in the rulings of the court upon the law, and as the evidence was conflicting this Court can not say that it was not sufficient to sustain the verdict; because if the jury credited the plaintiffs' evidence, as this Court must presume they did, it was sufficient to sustain the verdict. The judgment of the circuit court must therefore be affirmed.

AFFIRMED.

CHARLESTON.

CARSKADON *v.* MINKE *et al.*

36	729
42	384
26	729
46	104
46	163
26	729
51	393

Submitted September 3, 1885.—Decided November 14, 1885.

1. The practice of making irrelevant and inconsiderate points and assignments of error, and the repetition of the same point in various forms, ought to be avoided as far as possible by counsel practicing in this Court. Such practice condemned. (p. 736.)

2. A bill by a vendor to enforce his vendor's lien sets out an agreement between the plaintiff and the purchasers, by which it was agreed the land should be the joint property of the plaintiff and the purchasers, that it should be laid off into town lots, the lots sold, and the net proceeds applied to the payment of the plaintiff's lien, and the residue, if any, of the lien paid by the purchasers; that lots had been sold by the parties as a company or partnership partly for cash and partly on credits; that all the purchase-money had become due and a large portion of it remained unpaid; and prayed that the transactions of the company and the accounts of the sales of lots might be settled, and for a decree against the purchasers for the balance of the purchase-money, HELD:

   Such bill is not multifarious, nor is it demurrable for the reason that the purchasers of the lots so sold are not parties to it. (p. 737.)

3. In a suit to settle the affairs of an unincorporated company or a partnership—one of the members being dead—the surviving members are not under the statute of 1882 competent to testify as witnesses in regard to such affairs. (p. 738.)

4. Items or matters excepted to in the report of a commissioner, which is recommitted by the court, will not be open to judicial

investigation in acting upon the report made upon such recommitment, unless such items or matters are excepted to in the latter report. (p. 738.)

5. In a suit to enforce a vendor's lien the plaintiff may properly take a personal decree against the purchasers for the balance ascertained to be due him from them, and it is in the discretion of the court to authorize the plaintiff to enforce such personal decree without waiting for the collection of the proceeds of the land subject to such lien. (p. 740.)

SNYDER, JUDGE, furnishes the following statement of the case:

In October, 1877, T. R. Carskadon exhibited his bill in the circuit court of Mineral county against Frederick Minke, S. B. Gleason and the widow, administrator and heirs at law of S. F. McBride, deceased, in which he avers:

(1.) That by deed dated October 19, 1874, he sold and conveyed to the said Minke, Gleason and McBride the undivided three fourths of 100 acres of land near the town of New Creek, now Keyser, in Mineral county at the price of $15,000.00; that fifty dollars was paid down and the purchasers, executed to him their three bonds for the residue of the purchase money, the first for $4,950.00, and the other two for $5,000.00 each payable respectively May 1, 1875, May 1, 1876 and May 1, 1877, with interest on the last two from May 1, 1875 till paid; that a lien was retained in the deed to secure the payment of said bonds; that it was stipulated in said deed that as the parties thereto, under the name of the Keyser Land and Improvement Company, should sell portions of said land to be surveyed and laid off into town lots, the plaintiff should release his lien on such lots as should be sold and conveyed to purchasers thereof;

(2.) That by a subsequent agreement made October 23, 1874, between the plaintiff, Minke, Gleason and McBride, it was agreed that said land should be held for the joint and equal use of all said parties at their joint and equal expense, and when the same or any portion thereof should be sold the proceeds, after deducting expenses, should be retained by the plaintiff until three fourths thereof should aggregate $14,950.00, the amount of the purchase-money due the plaintiff, and in the event the proceeds from such sales should not

pay the aforesaid bonds as they matured, the said Minke, Gleason and McBride bound themselves personally to pay to the plaintiff any balance not so paid when due, and after such payment the parties should share equally in said proceeds, which were to be paid over on the demand of any of the parties entitled thereto, it being therein agreed that the plaintiff should act as treasurer for all the parties;

(3.) That soon after said conveyance, the plaintiff, Minke, Gleason and McBride proceeded to lay off said land into town lots, streets and alleys, had a map made thereof and commenced to sell the lots to sundry purchasers; that about one year before the filing of this bill said McBride died intestate, leaving three infant children as his heirs, and a widow; but before the death of McBride a large number of lots had been sold by written contracts to different purchasers, and a considerable portion of the money realized from said sales was expended by the parties acting under the name of the "Keyser Land and Improvement Company" in the laying out, opening and grading of streets and alleys and in the erection of houses, etc.; that a large number of said lots were sold through the agency of McBride, Minke and Gleason, and particularly the two latter, and they and each of them received the proceeds of such sales; that some of the said lots were sold by way of trades for lumber and building materials and other property, some of which was received by the plaintiff, some by Minke and Gleason and perhaps some by McBride; that most of the lots were sold partly for cash and partly on credits; some of them have been paid for in full and others only in part, and some of the purchasers so indebted are willing to pay the balances due from them when a deed can be made to them for their lots, which can not be done, by reason of the death of McBride, and they desire the court to authorize some one to convey the interest of McBride in said lots upon the payment of the balances due thereon;

(4.) That there never has been any settlement of the business and accounts among the members of said company although the plaintiff has been ready and frequently requested the other members to make such settlement; that a large part of the purchase-money bonds for said land still re-

mains due and unpaid to the plaintiff, in fact all of said last two bonds remain due and unpaid.

The plaintiff prays, that a commissioner may be appointed to convey the title of the heirs of McBride in the lots sold to the purchasers thereof; that his vendor's lien may be enforced by a sale of the said 100 acres of land not sold in lots in such manner as may to the court seem proper, that a settlement may be made under the direction of the court of the affairs of said company and between the plaintiff and the other members thereof; that all proper and necessary orders and references may be made, and that he may have other and general relief.

There seems to have been a demurrer to the bill which was overruled; and all the defendants filed answers, the defendants Minke and Gleason uniting in a joint and separate answer; but as a large portion of the proceedings in the circuit court are omitted from the transcript here, it does not appear when said demurrer and joint answer of Minke and Gleason were filed. The demurrer however was overruled by decree of May 11, 1881.

The answer of Minke and Gleason does not deny or controvert any of the allegations of the plaintiff's bill. They aver that the plaintiff as treasurer of the Keyser Land and Improvement Company received large amounts of lumber, cash, &c. as proceeds of lots sold and ask that a full and complete account be taken thereof and proper vouchers required for all disbursements. They file certain accounts, one showing a balance of $217.34 due to Minke from said company, and another for lumber furnished the plaintiff by respondents and McBride in February, April and May, 1875, amounting to $1,054.51, for which they claim credit on their bonds to the plaintiff for the purchase of said land. They state that they are willing and anxious that the accounts of said company should be adjusted and proper balances ascertained; that they are willing to do all in their power to arrive at correct results and will furnish all statements accessible to them of lumber or other things received by them in Cumberland and sold for the company's account or otherwise as they may be needed by the commissioner to whom the cause has been referred.

By decree of December 3, 1877, the cause was referred to a commissioner to state the accounts between the plaintiff and the other members of said company and ascertain the balance due the plaintiff on his purchase-money bonds; and by the consent of the parties a commissioner was appointed to convey the interest of the heirs of McBride in lots theretofore sold to the purchasers thereof upon the payment of any balances due thereon, and to unite with the living owners in making further sales of lots to be reported to court for confirmation, &c.

The commissioner made a report which was excepted to by the defendant, and the court having sustained one of the exceptions by decree of May 30, 1879, re-committed the report with directions to the commissioner to take further testimony and upon consideration thereof and the exceptions filed modify his report as to him may seem necessary. And by consent of the parties, it was ordered that all of said 100 acres of land not theretofore sold in lots, including the undivided one fourth of the plaintiff, should be sold by commissioners appointed for the purpose at public auction. The said commissioners made sale of all said real estate and made report thereof to court which was confirmed without exception.

The commissioner to whom the former report had been re-committed made a second report which was excepted to by the defendants and re-committed to him. He then made a third report which was also excepted to and again re-committed by the court with specific instructions to him. The commissioner then made and returned his final report containing three separate statements designated "E," "F" and "G" respectively, which are explained by the commissioner as follows:

"Statement 'E' is made up by charging Carskadon with his total receipts at the end of each year and crediting him with his disbursements and with one fourth of his net receipts and with the purchase-money notes as they fall due, carrying forward the balance found due at the end of each year into the accounts of the next year, with interest on said balance. This I have adopted as the correct method of stating the account. By this statement I find the balance due the complainant, T. R. Carskadon, on his purchase-money notes on November 22,

1881, to be $6,285.68, after charging him with all the money he has received from sales made by Reynolds and Shay, special commissioners, under the decree of this court in this cause and from all other sources.

"Statement 'F.' As a basis for this statement, I first ascertained the state of Mr. Carskadon's account with the partnership (exclusive of his purchase-money notes) by finding the balances due from him to the partnership at the end of each year, and calculating the interest on those balances up to November 22, 1881, the result of which showed a balance due the partnership from him, on November 22, 1881, of $9,582.17, without taking into consideration what he had received from Reynolds and Shay, special commissioners, from sales under decree in this cause. I then made up statement 'F' by charging said Carskadon with the amount so found due from him to the partnership, and crediting him with the amount of principal and interest due him on the purchase-money notes from the defendants, and also with one fourth of the amount due from him to the partnership. I also charged him with the amount received by him from sales made by special commissioners Reynolds and Shay. By this statement I found there would be due the complainant Carskadon on his purchase-money notes, on November 22, 1881, $5,933.45. I do not consider this the proper method of stating the account, but report it for the information of the court.

"Statement 'G.' In this statement I have first ascertained the amount due the partnership by each of the partners by the method above stated relative to Carskadon's account. I then added these several amounts together and obtained the total amount of the net receipts and interest on them of all the partners. Of this amount the complainant Carskadon is entitled to one fourth. I have accordingly deducted one fourth of this amount of total net receipts from the amount due from Carskadon to the partnership, and have then credited the balance of the amount due from him to the partnership on his purchase-money notes. I have also credited said notes with the amounts received by him from sales by commissioners Reynolds and Shay. By this statement I find there is a balance due the complainant Carskadon on his purchase-money notes from the defendants of $6,218.71¾."

The commissioner also reports that there is still due from the purchasers of land and lots at the sale made by commissioners Reynolds and Shay $883.88, less 3½ per cent commission, one fourth of which belongs to the plaintiff and the residue when collected is applicable to the payment of the amount found due the plaintiff. He also reports that there is still about $700.00 due from purchasers of lots of which three fourths of so much as may be realized therefrom will be applicable to the plaintiff's said debt. He also reports that there remains on hand some lumber belonging to the company still unsold, but as he was not furnished with any evidence of its value he is unable to report its value in money.

The defendants excepted to this report; *first*, because in ascertaining the balance due the plaintiff the commissioner has allowed as disbursements items that are not expenses and therefore not properly deducted from the plaintiff's receipts according to the agreement of Oct. 23, 1874—giving in the exception a long list of such items; *second*, because the commissioner has allowed the plaintiff credit for the full amount of freight charges paid by him to the railroad for lumber purchased by the company when such credit should at most have been for only one half of such charges; and *third*, because the evidence shows that $10,179.87 worth of lumber, shingles, &c. were received by the plaintiff as treasurer of the company, on which $937.95 was paid for freights, while only $8,803.56 worth is accounted for. These were the only exceptions filed to the last and final report.

By decree entered December 6, 1881, the court overruled all of the said exceptions except as to one small item in the list filed with the first exception which item, and another sum admitted by the plaintiff, it deducted from the balance found due the plaintiff by the commissioner; and after reciting, that statement "E" of the report "having been made out in conformity with the fifth exception of the defendants to the report filed Nov. 12, 1879, and the opinion of the court rendered June 2, 1880, sustaining said exception," the decree adopts said statement "E." with the modification just indicated and finds according thereto that the plaintiff is entitled

to recover from, and decrees to him against, the defendants, Minke and Gleason personally, and the estate of McBride in the hands of his administrator, the sum of $6,269.34 with interest thereon from Nov. 22, 1881 till paid and the costs of suit incurred since the decree of November term, 1879. From this decree the defendant Minke obtained an appeal and *supersedeas.*

R. White for appellant.

F. M. Reynolds for appellee.

SNYDER, JUDGE:

The petition for the appeal in this cause contains, in various forms, modifications and subdivisions, about thirty assignments of errors, many of which do not arise in the record, and nearly all of them are without merit. Some of them are to interlocutory orders never acted upon or given any effect in the final decree. Others are to the action of the court sustaining exceptions taken by the appellant, and others again are to questions of fact and accounts reported upon by the commissioner concerning which the evidence on which the commissioner acted was not required to be filed or made a part of the record. *Thompson v. Catlett*, 24 W. Va., 524.

While this Court is necessarily indulgent in giving lattitude to counsel as to the form in which they may elect to present the errors complained of, or as to the number of assignments they may think proper to make, it is earnestly advised and hoped that they will not carelessly and unnecessarily occupy the time and increase the burdens of Court by making irrelevant and inconsiderate points, and assignments which ought and would be omitted upon a proper examination and understanding of the record. Such points and assignments, and the repetition of the same point in various forms, as also what may be termed "fishing" assignments, can not subserve any good purpose, but are a positive inconvenience to the Court and discreditable to counsel.

The assignments now before us are rather the occasion than the cause of these remarks, as the fault complained of has been found in other cases so frequently that we deem it our duty to call attention to it. But in doing so no particular re-

flection is intended to be made upon the action of the learned counsel who may have prepared the petition in this cause, as no doubt it was prepared in good faith and, perhaps, without time to examine the record thoroughly.

The first assignment of error of sufficient importance to require notice is the overruling of the demurrer to the bill. The appellant contends that the bill is multifarious, that it seeks to enforce the plaintiff's vendor's lien, to settle the transactions of the Keyser Land and Improvement Company, and to specifically execute contracts made by said company with various purchasers for lots sold against such purchasers without having made them parties.

This we think is a plain misconception of the object and purpose of the bill. It does not seek to enforce the contracts for lots sold and asks no relief whatever against the purchasers thereof. It does not contemplate any interference with their contracts or any disturbance of their rights. To have made these purchasers parties and have asked relief against them would have made the bill multifarious. The agreement of October 23, 1874, provided that a portion of the proceeds of the lots sold should be credited on the plaintiff's debt, it was therefore necessary for the plaintiff to state that fact and ask for an ascertainment of the amount realized from such sales and a settlement between the parties to said agreement in order to find the balance due on his debt. That agreement was made by all the parties and it distinctly and expressly provided by reference to the deed of October 19, 1874, and the contract of purchase, that the plaintiff should release his vendor's lien on all lots sold. The lots having thus been sold free from the lien of the plaintiff, he could not have enforced his lien against them. The appellant joined in these sales, and he was, consequently, estopped from demanding that the purchasers thereof should be brought into this suit for the purpose of subjecting their lots to the payment of his debt to the plaintiff. The proper and only purpose of the bill is plainly stated in it. It was to enforce the plaintiff's lien for the purchase-money due against the unsold portion of the said land and it contained the proper allegations and parties for that purpose. I therefore think the demurrer was rightfully overruled.

It is claimed that the circuit court erred in its direction to the commissioner to exclude the testimony of the parties in settling the firm or company accounts between themselves. It is evident from the exceptions that this ruling was made at the instance of the defendants and therefore in part at least by the appellant himself. But be this as it may, the court did right. McBride one of the partners was dead and in such case the statute declares that the survivors shall not be examined as witnesses in regard to any personal transaction or communication between them and such deceased person. Sec. 23, ch. 160, Acts 1882, p. 544.

Several assignments of errors are founded on the overruling of the defendants' exceptions to reports of the commissioner which were afterwards re-committed and which exceptions were not renewed or made to the final report on which the decree complained of is based. The items or matters thus excepted to in the former report and not excepted to in the final report can not be considered as open for judicial investigation either in the court below or the appellate court. *Kee* v. *Kee*, 2 Grat. 117.

The only other objections open for consideration by this Court are the exceptions of the defendants to the final report of the commissioner, and the propriety of the final decree.

The court in its decree of December 5, 1881, states its reasons for everruling the first and second exceptions to said report, in substance, as follows: It appearing to the court from the evidence and reports of the commissioner and the answers and accounts filed therewith that, by the mutual agreement of all the parties and with a view of promoting the sale of the said 100 acres of land, many lots thereof were sold for horses and other property, and large quantities of lumber were purchased by them, one half of which was to be paid for in lots at specific prices and the other half in cash; that the horses and lumber and other property thus obtained were sold by the several partners; each in rendering an account of his transactions charged himself with the gross proceeds received therefrom and credited himself with the amounts paid for freights and other expenses incurred in taking care and disposing of the same, including expenses of the partners while attending to the business, and that the

money thus realized was considered by all as the proceeds of the land; and it appearing further that all the items in the said first exception are charges of this character and that the plaintiff has been charged with all the gross proceeds received by him and not merely the one half thereof, and that the receipts with which he has been charged greatly exceed the amount paid by him for freights and other expenses, and that the defendants have the benefit thereof, all of which the court thinks is just and equitable, it doth overrule said first and second exceptions.

I think these reasons of the circuit court are well sustained and fully warranted by the record. It is not claimed that any of the items mentioned or referred to in said exceptions are incorrect or that the company did not get the benefit of them, but it is claimed that under the agreement of October 23, 1874, the *expenses* alone should have been deducted from the gross proceeds of the sale and three fourths of the residue credited on the plaintiff's debt, leaving the other charges and accounts to be settled among the parties as a distinct transaction. The injustice and inequity of so doing is sufficiently apparent from the reasons given by the circuit court and further discussion could not make them plainer.

The third exception to the report was also properly overruled. The report does not, nor does the record, so far as I can discover, show any such figures as $10,179.87, or $8,803.56, or anything approximating either. This exception seems to be entirely without merit, but even if such were not the case, the exception is too general, indefinite and uncertain to be considered by the Court. *McCarty* v. *Chalfant*, 14 W. Va. 531; *Chapman* v. *R. R. Co.* 18 *Id.* 185.

The court, in its decree, assigns as a reason for adopting statement "E" of the commissioner's report the fact that it was made in conformity with an exception filed by the defendants to a former report. It having been made, therefore, at the instance of the appellant, he is not in a situation to complain of it; and moreover, the commissioner adopted it as the correct statement, and not being excepted to it can not be set aside by this Court unless it is plainly erroneous on its face. *Ward* v. *Ward*, 21 W. Va. 262; *Thompson* v. *Catlett*, 24 *Id.* 524.

The report shows that the money received from time to time by the plaintiff as the proceeds of lots sold was generally in small sums and that he was constantly disbursing parts of it for expenses of the company. It was, therefore, necessary to fix some period for striking balances and applying the net proceeds to the liquidation of the plaintiff's debt. To do so annually was certainly not to the prejudice of the appellant. I am of opinion that said statement was as nearly just to all the parties as it could be made under all the circumstances.

It is asserted that compound interest was charged in this statement. But upon an examination of the same it appears that where the proceeds credited in any year did not pay the interest up to the date of such credit, interest has been charged on the principal only of the debt according to the rule announced by this Court in *Hurst* v. *Hite*, 20 W. Va. 183, and *Ward* v. *Ward*, 21 *Id.* 262.

It is further contended that the decree of December 5, 1881, is erroneous because it gives a personal decree against the purchasers for the balance of the purchase-money without waiting for the collection of the $883.88, due from the purchasers of the land and lots sold and the $700.00 due to the company, as reported by the commissioner, and crediting so much of said collections as may be found applicable thereto on the debt due the plaintiff. By the terms of the agreement of October 23, 1874, the appellant and his co-purchasers agreed and bound themselves to pay the bonds due the plaintiff as they should become due. This they did also by the bonds themselves. It is clear then that the plaintiff might have sued at law and recovered a personal judgment for the balance due on the bonds. It can not therefore be seriously contended that because he has sued in equity he has not the same right. All the bonds were long past due and the plaintiff was clearly entitled to a personal decree. The uncollected assets when realized will of course belong to the parties according to their respective rights and the appellant, if he chooses, may apply his portion in satisfaction of the plaintiff's decree against him if he shall not have paid said decree off before such assets are collected. *Fisher* v. *Brown*, 24 W. Va. 713.

I have now considered all the questions presented by the

record which are of sufficient importance to require notice, and having found no error to the prejudice of the appellant the decree complained of must be affirmed.

AFFIRMED.

CHARLESTON.

BEALL v. WALKER *et al.*

Submitted June 22, 1885.—Decided November 14, 1885.

1. After an adjudication in bankruptcy all the property of the bankrupt passes to the assignee, who takes it subject to all the liens and equities then existing against it. (p. 752.)

2. The bankruptcy-court has the right and the power to enjoin the prosecution of any suit thereafter instituted in a State-court to enforce any previous lien against the bankrupt's property; as it has the right to administer fully upon the estate of the bankrupt liquidating and settling all liens or ordering the property sold subject to the liens. (p. 752.)

3. When the bankruptcy-court orders the property sold subject to the liens, there is no reason why the State-court should not proceed to enforce the liens. (p. 752.)

4. Where neither the bankruptcy-court, the assignee nor any creditor objects, the State-court has jurisdiction to proceed with such suit to enforce the liens. (p. 752.)

5. The assignee should be made a party to such suit. (p. 752.)

6. The State-court but for the proceeding in bankruptcy has jurisdiction to enforce a lien against the land of a debtor, and if that jurisdiction is not ousted by the interference of the bankruptcy-court or proper pleading in the cause by the assignee or creditor of the bankrupt, the State-court may lawfully proceed to enforce the lien. (p. 752.)

7. The lien is by the Bankrupt Act expressly saved and respected; and while the bankruptcy-court has the undoubted right to enforce the lien itself and may by injunction prevent the State-court from the enforcement of it, yet by the active or passive permission of the bankruptcy-court the State-court may proceed with the enforcement of the lien. (p. 752.)

8. To obtain the benefit of *res judicata* it must be pleaded. (p. 753.)

9. Where B. purchases a tract of land of W. and takes a general warranty-deed, and afterwards ascertains that judgments in favor of divers persons have been recovered and docketed against W., and to save his land from being sold to satisfy said judgment-liens B. pays off the judgments, he is entitled to be subrogated to the liens of such judgment-creditors against any other land owned by W. (p. 753.)

10. Where a contract was made for the purchase of a tract of land, and the consideration was $800.00, and the vendor agreed to take as a part of the consideration a lot at $75.00, the title to which was in the infant-daughter of the vendee, and all the purchase-money had been paid except the lot, to which the grantee had no title, in a suit to enforce a lien against the land as the property of the vendee the court did not err in requiring the price of the lot, to-wit, $75.00, to be paid to the vendor instead of such lot. (p. 754.)

A statement of the facts of the case will be found in the opinion of the Court.

W. S. Sands for appellant.

No appearance for appellee.

JOHNSON, PRESIDENT:

In October, 1877, Beall bought of R. W. Walker a tract of 279½ acres of land in Gilmer county for $844.30, of which he paid $250.00 in cash and executed his two notes to said Walker for the residue of the purchase-money, one for $362.06 and the other for $232.24. On December 10, 1877, he paid the note for $362.06; and Walker executed a deed to him for said land with covenant of general warranty. Beall afterwards ascertained that there were various judgment-liens on said land, to enforce which liens a suit in chancery was brought against said Walker and said Beall and others, and said land was decreed to be sold to pay said liens. The said liens were as follows: To Fleming and Bennett commissioners $254.19, with interest; to Thompson & Jackson, $174.57; to William Logan & Co. $264.45; to Prager & Epstein, $285.86 subject to a credit of $79.06. The said Beall filed his bill in January, 1881, alleging these facts, and that he was compelled to pay, and did pay those several sums, in-

terest and costs, to save his land, and that after giving credit to said Walker for the last payment of purchase-money due, $232.24 with its interest, he had been compelled to pay to relieve his land $748.49, to which extent he insists that he is entitled to be subrogated to the liens of the said several judgments against any land said Walker may own. The bill charges that said Walker had bought of P. Hays and paid for a tract of 100 acres of land in Calhoun county and was entitled to a deed therefor; that said defendant R. W. Walker claims that said land was paid for by his son J. M. Walker, and is owned by him; that the said R. W. Walker purchased said property in the name of his son J. M. Walker for the purpose of hindering, delaying and defrauding his creditors; that said Walker was adjudicated a bankrupt on his own petition in 1878, and on January, 1880, William E. Lively was appointed assignee, but that no assets ever came into his hands, and that said Walker has never received his discharge in bankruptcy, and plaintiff is not precluded from prosecuting this suit. He prays that said 100 acres of land may be sold to pay said liens, and that plaintiff may be subrogated to the rights of said judgment-creditors, and for general relief.

Walker demurred to and answered the bill. He denies that the 100 acres of land is his, but avers that it was paid for by his son and is owned by him; that he, R. W., had bought a house and lot in Arnoldsburg, Calhoun county, of P. Hays, and gave him some personal property thereon, not more than $75.00 in value; that he had become indebted to his son for about $700.00, borrowed money, for which he executed his note. After negotiations by both himself and son, J. M. Walker, they succeeded in securing the 100 acres of land, on which respondent now resides for the sum of $800.00, Hayes agreeing to take the Arnoldsburg house and lot at $400.00, which had become the sole property of his son, J. M. Walker, by reason of respondent's indebtedness to him, and the lot devised by James Shaw to R. J. Walker's infant-daughter Josephine, at $75.00, and the remainder in money which respondent believes has been paid by said J. M. Walker. He denies all fraud, &c.

J. M. Walker answered the bill and substantially agrees with his father as to the purchase of the 100 acres and claims

it as his own. He exhibits two notes purporting to have been executed to him by his father, one for $100.00 dated March 9, 1871, the other for $600.00, dated October 12, 1875; and two receipts to him purporting to be signed by Peregrine Hays, one for $275.00, dated December 10, 1877, and the other for $50.00 balance of purchase-money, dated January 22, 1878. He avers that the said tract of 100 acres is his; that he paid for it out of his own funds. He denies all fraud charged in the bill.

Depositions were taken, and the cause referred to a commissioner, who reported the liens, and that they had been paid by Beall, and that R. W. Walker owned the 100 acres of land, &c. The cause was heard on October 8, 1883, and the court decreed that R. W. Walker should pay to H. C. Beall $883.04 with interest; that Beall be subrogated to the rights of the lienors, whose liens he had paid; and that said 100 acres of land be sold, &c. From this decree J. M. Walker appealed. William E. Lively the assignee in bankruptcy of R. W. Walker, was made a defendant but did not answer.

It is here insisted by counsel for the appellant, that the State-court had no jurisdiction of the cause, and that this appears on the face of the bill. As far as this record discloses, this question of jurisdiction would present no difficulty but for the following allegation in the bill: "The said Robert W. Walker was on or about the 6th day of August, 1878, adjudicated a bankrupt upon his own petition before R. S. Northcott, register in bankruptcy at Clarksburg, and that on the 20th day of January, 1880, William E. Lively was appointed assignee of said Walker, but there are no assets in, or to come to his hands, all of which will more fully appear by reference to the proceedings had in the chancery cause of William Logan & Co. and others against Robert W. Walker and others, but that no discharge has been granted to said bankrupt; that the cause of action, upon which this suit is instituted, did not, as plaintiff is advised, accrue to him, until the decree aforesaid was discharged by him, as hereinbefore stated, which was long after the adjudication in bankruptcy aforesaid and that such adjudication in bankruptcy does not preclude the plaintiff from prosecuting this suit upon

and by reason of the breach of covenant of warranty contained in the deed from said Walker to him."

I will refer to a number of State and Federal decisions, to enable us to see whether, upon a demurrer to the bill by the bankrupt, the jurisdicton of the State court was ousted. Under the bankrupt law, a lien against the bankrupt's property, and the right to enforce it remain unimpaired. (*Bently* v. *Wills*, 61 Ill. 59.) Where a mortgager of real or personal property becomes a bankrupt, and the mortgagee does not sell the property under the direction of the bankruptcy-court, nor release or deliver up to the assignee in bankruptcy his claim on the property, the mortgagee cannot prove any part of his debt against the estate in bankruptcy. A bankrupt is only discharged from such debts, claims, liabilities and demands as were or might have been proved against his estate in bankruptcy, and a discharge in bankruptcy is not a good plea in bar, except as to such debts as were or might have been so proved. *Pierce* v. *Wilcox*, 40 Ind. 70. The twentieth section of the bankrupt act was not intended to disturb the lien of the mortgagee except with his express consent and through the joint action of himself and the assignee in bankruptcy. If the mortgagee desires to prove his debt and participate in the assets of the bankrupt, he can do so upon the release of his lien; but the option is with him. (*Cole* v. *Duncan*, 58 Ill. 176.) This was a suit to foreclose a mortgage. The defendant pleaded a discharge in bankruptcy, and the lower court held the plea sufficient and dismissed the bill. The appellate court reversed the decree holding as above.

In *Fehley* v. *Barr*, 66 Penn. St. 196, it was held, that the 20th section of the bankrupt law of 1867 expressly saves the lien of a judgment, unless indeed the judgment-creditor releases or conveys his claim to the assignee and is admitted to prove his whole debt. He is entitled if he does not do so to proceed and realize whatever he can from his security and then come in and prove for the balance. In *McCance* v. *Taylor*, 10 Gratt. 580, it was held that under the bankrupt act of 1841 the lien of a judgment was not defeated by the discharge of a debtor as a bankrupt, and that such a lien could be enforced in the State-court. To the same effect is *Stoddard* v. *Locke*, 43 Vt. 574. Under the same act it was

held that creditors, who had not proved their debts in the proceedings in bankruptcy, might institute suits to set aside fraudulent conveyances made by their debtor, before he petitioned for the benefit of the bankrupt law, and might impeach his discharge in bankruptcy on the ground of fraud o r the willful concealment of his property or rights of property contrary to the provisions of the act of Congress; such suits being instituted more than two years after the decree of discharge in bankruptcy; that such suits might be instituted in any court, State or Federal, in which independent of the bankrupt act a suit might be properly brought against the bankrupt. (*Tichenor* v. *Allen*, 13 Grat. 15.)

In *Stuart* v. *Hines & Eames*, 33 Ia. 60, it was held, that after the filing of a petition in bankruptcy, which is followed by an adjudication, no valid lien can be acquired against the property of the bankrupt by proceedings instituted in State courts. In such case the assignee is not estopped from asserting his claim to the property by the fact, that he failed to appear and defend in place of the bankrupt in an action commenced in the State-court subsequently to the filing of the petition in bankruptcy. No such duty is required of the assignee. Of course a judgment against a bankrupt after the adjudication would not hold the property transferred to the assignee. If it would, the bankrupt law would fail in the object of its creation.

In *Douglas* v. *St. Louis Zinc Company*, 56 Mo. 388, it appeared, that suit was instituted in a State-court to enforce a mechanic's lien, after a petition to have the debtor adjudicated a bankrupt had been filed. The suit was defended on the ground, that the court had not jurisdiction. The plaintiffs offered to prove, that the bankrupt court had ordered the property, to which the lien attached, to be sold by the assignee, and that the property had been sold by the assignee subject to the plaintiff's lien, and the plaintiff was by the the bankrupt-court ordered to proceed in the State-court to enforce the lien. All this evidence was rejected by the court below, and all evidence tending to prove plaintiff's claim was rejected, on the ground that the State-court had not jurisdiction of the cause. The court by Voories, judge, said: "This was, we think, erroneous. We can see no reason, why

the court could not, after the property had been disposed of in the bankruptcy-court subject to the lien of the plaintiffs, and all the proceedings dismissed therefrom, proceed to try the cause and determine the rights of the parties."

In *Pindell's Assignee* v. *Vemont's Executor*, 14 B. Mon. 400, it was held, that upon a decree in bankruptcy being rendered all the rights, interests and choses in action of the bankrupt pass to the assignee; that, where by the terms of a mortgage the mortgager has the right to retain possession of the mortgaged property, the assignee in bankruptcy can not take it, until the mortgage-debts are extinguished; that an assignee in bankruptcy, who comes into the State-court by answer and cross-bill and submits his rights as assignee to be heard and adjudicated, is estopped to question the jurisdiction in the Court of Appeals.

In *Voorhies* v. *Frisbie*, 25 Mich. 476, it was held, that a State-court has no jurisdiction of a bill in equity filed by an assignee in bankruptcy to set aside a conveyance made by the bankrupt in *fraud of the bankrupt act*—also, that of suits that *can only be maintained under the bankrupt act*, the United States courts have exclusive jurisdiction.

In the case of *In re McGilton*, 3 Biss. 152, Drummond, judge, said: "It is sometiemes the case, that creditors, who have judgments, proceed to sell the property covered by the liens of the judgments, where it has passed by law to the assignees; but the courts have uniformly held these sales invalid, if made without authority of the bankruptcy-court. If it be admitted, the court, where there are liens on the real property of the bankrupt, can order it to be sold free from the liens, to marshal the assets and pay off the liens, it is equally competent for the court to authorize the creditor to proceed in the usual way to collect his judgment, if that course seems best for the estate."

In the case of "*The Ironsides*," 4 Biss. 518, it was held, that a party having a maratime lien may even after the filing of a petition in bankruptcy by the owner seize the vessel under a libel in another district, and the latter court has jurisdiction to hear and determine the lien. In such case the assignee has the right to appear and be heard, and the court in bankruptcy should accept the determination of the court in

admiralty as to the validity and amount of the lien. The words in section one of the bankrupt act, extending jurisdiction "to the ascertainment and liquidation of the liens and other specific claims" upon the bankrupt's property, apply only to cases, where these liens or claims have not been previously determined by other competent tribunals. It was held under the bankrupt act of 1841, that *bona fide* liens under the State laws are valid under the bankrupt law, and a State-court might enforce such liens. But if there be fraud in the creation of such liens, and the creditors through the assignee of the bankrupt seek to set the liens aside, the district court or circuit court of the United States affords the appropriate jurisdiction; that a State-court by the enforcement of a lien can not draw to its jurisdiction the administration of the bankrupt law; that, where this effect will necessarily result from the exercise of jurisdiction, the circuit court may interpose injunction and stay proceedings in the State-court. (*McLean, assignee* v. *The Lafayette Bank et al.*, 3 McLean 185.)

In *Glenny* v. *Langdon*, 98 U. S. 20, it was held, that it is only through the instrumentalities of his assignees, that creditors can recover and subject to the payment of their claims the property, which the bankrupt fraudulently transferred prior to the adjudication, or which he conceals from and fails to surrender to his assignees; that assignees of the bankrupt are subject to the control and direction of the proper court, and it may for good cause shown compel them to take the requisite steps for the full and complete protection of the rights of the creditors. This is the case principally relied upon by counsel for appellant to show, that the State-court had no jurisdiction of this cause. But the principles there decided are undisputed and do not apply to a case like this. That case decided principles for the benefit of creditors generally and did not embrace a case, where the State-court was merely proceeding to enforce a lien against the bankrupt's estate which attached long before the commencement of the proceedings in bankruptcy.

Mays v. *Fritton*, 20 Wall. 414 is a case, in which after the adjudication in bankruptcy a mortgagee brought suit in a State-court to foreclose the mortgage, and it was held that when the consideration of a question is *prima facie* within the

jurisdiction and control of a State-court, such as determining to whom the surplus of a fund raised by the foreclosure of a mortgage belongs, if the person, who gave the mortgage, becomes bankrupt, and his assignee goes into the State-court, submits to its jurisdiction and no where asserts in any way the rights of the federal courts in the matter, he can not after taking his chances for a decree in his favor and suffering one against him raise in this Court the point of want of jurisdiction in the State-court.

In *Doe* v. *Childress*, 21 Wall. 642, it was held, that under sec. 14 of the bankrupt act an attachment, which under state-laws is a valid lien, laid *more* than four months before the proceedings in bankruptcy began, is not dissolved by the transfer to the assignee. And if such assignee, does not intervene (which in any such case he may do) and have the attachment dissolved or the cause transferred to the federal court sitting in bankruptcy, but on the contrary allows the property to be sold under judgment in the proceedings in attachment, the purchaser in a case free from fraud will hold against him; that is to say, the assignee cannot attack collaterally such purchaser's title. In this case the Supreme Court approves the decision in *Kent* v. *Downing*, 44 Ga. 116, and *Gibson* v. *Green*, 45 Miss. 209, the substance of which, as quoted by the supreme court of the United States, is: "The assignee may on his own motion be made a party, if for no other reason than to have it properly made known to the court that the defendant has become bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the court in some authentic mode. It may be denied, and the State-court can not take notice of the judgments of other courts by intuition. They must be brought to the notice of the court, and this cannot be done without parties."

In *Eyster* v. *Gaff, et al.*, 91 U. S. 521, it was held, that, where the assignee in bankruptcy of a mortgagee is appointed during the pendency of proceedings for the foreclosure and sale of the mortgaged premises, he stands as any other purchaser would stand, on whom the title has fallen after the commencement of the suit. If there be any reason for interposing, the assignee should have himself substituted for the bankrupt or

be made a defendant on petition. A court cannot take judicial notice of the proceedings in bankruptcy in another court; and it is its duty to proceed as between the parties before it, until by some proper pleadings in the case it is informed of the changed relations of any of such parties to the subject-matter of the suit; that the jurisdiction conferred upon the federal courts for the benefit of an assignee in bankruptcy is concurrent with and does not divest that of the state-courts in suits, of which they had full cognizance.

In the case of *In re Iron Mountain Co.*, 9 Blatch. 320, it appeared, that after the filing of a petition, in which J. was adjudicated a bankrupt, and after the appointment of an assignee and the conveyance to him of all the estate of the bankrupt S. commenced a suit in a State-court to foreclose a mortgage on real estate of J. The district court after restraining the prosecution of the suit made an order dissolving the injunction and permitting the suit to proceed. The mortgaged premises were worth less than one half of the amount of the mortgage. The mortgage was given long before the bankruptcy of J., and there was no proof of the invalidity of the mortgage. On a petition of review by J. it was held, that the order of the district court was proper; that the district court has power to restrain the holder of a mortgage or other lien on the property of a bankrupt from enforcing such lien by suit, and when the value of the property exceeds the amount secured by the lien, or the amount or validity of the lien is in doubt, it is generally proper to do so. In that case Woodruff, judge, said:

"There is no doubt whatever of the power of the district court, in bankruptcy, to take administration of the entire estate, and ascertain and liquidate the liens thereon, and to restrain the holder of a mortgage or other lien from proceeding in any court to enforce such lien; and when the value of the property exceeds the amount secured by such mortgage, or lien, it will in general be proper to do so, in order to preserve to the assignee his right, secured by sec. 20 of the bankrupt law, to receive the excess in value, and release the right of redemption, or to sell the property, subject to the mortgage, or to invoke the power of the court to first liquidate and settle the amount of the lien. So it will be proper to

restrain the proceeding in any other court, where the amount or the validity of the lien is in doubt. This may often be necessary to the full protection of the general creditors, who are entitled to such protection in the court in bankruptcy, where they are to look for the fund to be distributed to them. In all such cases it would be the duty of the assignee, to apply to the court in bankruptcy to assist him in bringing all the assets into that court to be applied and disposed of according to the rights and interests of all concerned, whether holders of liens or general creditors. But where no advantage can result to the estate of the bankrupt, I see no reason why the court should interfere, when neither the assignee, nor any creditor invokes such interference, and it appears without contradiction that the equity of redemption is of no value. There is no excess of value to be paid to the assignee on his releasing the right of redemption. There is nothing to be sold subject to the mortgage, which will yield anything; and any action of the district court, for the liquidation and settlement of the amount of the lien, and for the sale of the property to satisfy it, would be a mere expense to the estate, producing nothing."

In the case of *Reed* v. *Bullington*, 49 Miss. 228, Simrall, J. for the court, said: "There is no motive or reason why the assignee should interfere unless the property will yield a surplus after paying the lein debt." And the court held that where no action has been taken by the assignee or creditor to deal with the property in the bankruptcy-court, the State-court has jurisdiction to make the lien available.

In *Gibbs* v. *Logan*, 22 W. Va. 208, this Court considered the question, whether an attachment-suit instituted more than four months before the adjudication in bankruptcy could be prosecuted to judgment and satisfaction of the debt out of the attached property in the State-court notwithstanding the bankrupt proceedings; and we held, that such suit could be prosecuted.

The question here arises, whether a suit may be instituted after the adjudication in bankruptcy to enforce a lien acquired before, where there is no interference by the assignee or by the bankruptcy-court. The State-court will follow the decision of the Federal courts on the construction of the

be made a defendant on petition. A court cannot take judicial notice of the proceedings in bankruptcy in another court; and it is its duty to proceed as between the parties before it, until by some proper pleadings in the case it is informed of the changed relations of any of such parties to the subject-matter of the suit; that the jurisdiction conferred upon the federal courts for the benefit of an assignee in bankruptcy is concurrent with and does not divest that of the state-courts in suits, of which they had full cognizance.

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restrain the proceeding in any other court, where the amount or the validity of the lien is in doubt. This may often be necessary to the full protection of the general creditors, who are entitled to such protection in the court in bankruptcy, where they are to look for the fund to be distributed to them. In all such cases it would be the duty of the assignee, to apply to the court in bankruptcy to assist him in bringing all the assets into that court to be applied and disposed of according to the rights and interests of all concerned, whether holders of liens or general creditors. But where no advantage can result to the estate of the bankrupt, I see no reason why the court should interfere, when neither the assignee, nor any creditor invokes such interference, and it appears without contradiction that the equity of redemption is of no value. There is no excess of value to be paid to the assignee on his releasing the right of redemption. There is nothing to be sold subject to the mortgage, which will yield anything; and any action of the district court, for the liquidation and settlement of the amount of the lien, and for the sale of the property to satisfy it, would be a mere expense to the estate, producing nothing."

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bankruptcy-law. We are cited to a number of State-decisions, but they are in accord with the Federal decisions cited above. We fully admit, that after an adjudication in bankruptcy all the property of the bankrupt is transferred to the assignee, who takes the property, just as the bankrupt held it, subject to all the liens and equities then existing against it. The bankruptcy-court has the right and the power to enjoin the prosecution of any suit thereafter instituted in the State-court to enforce any previous lien against the bankrupt's property; as it has the right to administer fully upon the estate of the bankrupt, liquidating and settling all liens or ordering the property sold subject to the liens. When it orders the property sold subject to the liens, then there is no reason or decision which would prevent the State-court from proceeding to enforce the lien. When neither the bankruptcy-court, the assignee nor any creditor objects, the State-court has jurisdiction to proceed with such suit to enforce the lien. If it is known, that the debtor is a bankrupt, the assignee is a proper and necessary party to such suit to enforce the lien so that he may, if he chooses, object by proper pleadings to the State-court proceeding to enforce such lien; and if it fails to desist, he may then ask the bankruptcy-court for a restraining order. But he may see that the equity of redemption is worth nothing, that the lien will more than absorb the property to which it attaches; and he may choose therefore not to interfere with the action of the State-court. The State-court but for the bankruptcy proceedings certainly has jurisdiction to enforce a lien against the land of a debtor, and if that jurisdiction is not ousted by the interference of the bankruptcy-court or by proper pleading in the cause by the assignee or creditors of the bankrupt, the State-court may lawfully proceed to enforce the lien. The lien is expressly by the bankrupt act saved and respected; and while the bankruptcy-court has the undoubted right to enforce the lien itself, and may by injunction prevent the State-court from the enforcement of it, yet by the active or passive permission of the bankruptcy-court the State-court may proceed with the enforcement of the lien.

We do not think therefore, that the jurisdiction of the

state-court was ousted in this cause. W. E. Lively, the assignee in bankruptcy of the debtor R. W. Walker, was made a defendant and served with process in the cause. He did not answer the bill, and the record fails to show, that there was any interference with the prosecution of this suit by either the Federal court, the assignee, or any creditor of R. W. Walker.

It is also assigned as error, that the court did not dismiss the bill because the question, whether Walker had any other lands was *res judicata* in the suit of Wm. Logan & Co. against said Walker. It is a sufficient answer to this assignment that the *res judicata*, if it existed, was not pleaded. It could not be taken advantage of, unless it was pleaded in this suit. (*W. M. & M. Co. v. Va. C. C. Co.*, 10 W. Va. 250.)

It is also assigned as error, that Beall was subrogated to the rights of the judgment-creditors, whose judgments he paid. We think there is nothing in this position. No authority is cited to sustain it. Beall bought the land with general warranty and afterwards found judgment-liens recorded against it, which he was compelled to pay or lose his land. We think there is no doubt of his right to subrogation. It is denied that the proof shows that Beall did pay those judgments. The commissioner's report ascertains this fact and the exact amount he paid, and no exception to the report questions the correctness of this finding.

It is also assigned as error, that the court found that the said 100 acres of land sought to be subjected was the property of R. W. Walker and not of James Walker. We have carefully examined the evidence and agree with the circuit court, that R. W. Walker and not James M. Walker bought and paid for the said land, and that the said land belonged in equity to the said R. W. Walker, and that the purchase of the same in the name of his son, James, was a fraud on his creditors.

The court did not err in overruling the exception to the commissioner's report. The first exception "for errors appearing therein," will not be considered, as it is too vague and general. The other, that it finds that R. W. Walker owned the land, is fully sustained by the evidence.

The last assignment of error is, that the court erred in

modifying and altering the contract between Perregrine Hays and Robert W. Walker as agent of James Walker; that Hays had agreed to accept in part payment of the 100 acres a lot in Arnoldsburg, Calhoun county, the title to which was in Josephine Walker, the infant-daughter of R. W. Walker. No one would suppose, that the court would be bound to stay its proceedings, until Josephine Walker should become of age, before R. W. Walker's interest in the 100 acres could be sold to discharge a lien thereon. The value of the lot was fixed by the parties at $75.00, and the court decreed, that this $75.00 with its interest was the first lien for purchase-money due to Hays. He did not object to receiving the money instead of the lot, which Walker had no right to sell; and the court did not err in decreeing the land to be sold, and this $75.00 with interest to be paid to Hays, which was the balance of the purchase-money, and requiring Hays to make the legal title, and in default that a commissioner should make it.

There is no error in the decree, and it is therefore affirmed.

AFFIRMED.

CHARLESTON.

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McCANDLESS, J. B. & S. *v.* WARNER, *et al.*

Submitted June 19, 1885.—Decided November 14, 1885.

1. If a party obtain a deed for property, for which he has paid a valuable consideration, and if sec. 7 of the English statute of frauds substantially exists in this State, although in terms it is omitted from our statute, it may be shown, that such party holds the property so conveyed in trust for another. (p. 780.)

2. Such trust need not be created in writing but must be manifested and proved in writing by the party enabled by law to declare the trust; and such writing must show both the existence of the trust and the terms thereof. (p. 780.)

3. The writing to prove such trust need not be made at the time the trust is created, but may be made at any time thereafter, and it is

not necessary that it be addressed to the *cestui que trust* or to any other person. (p. 780.)

4. Letters written to any one after the creation of the trust, in which the trust and the terms thereof are admitted and disclosed, are a sufficient declaration of such trust within the statute. (p. 780.;

5. It is not necessary, that the trust and the terms thereof shall all appear in one letter or other writing, but if they can be ascertained with reasonable certainty from a number of letters or or from one or more letters and other writings, it is sufficiently proved. (p. 780.)

6. In ascertaining the meaning of such writings the court will, if necessary, look to the surrounding circumstances. (p. 780.)

7. An express trust needs no consideration to support it. (p. 782.)

Quære. Is sec. 7 of the English statute of frauds, although in terms omitted from our statute, substantially in effect in this State, and can a trust like that shown in this case be proved by parol evidence?

8. A decree although erroneous will not be reversed unless to the prejudice of the party complaining thereof. (p. 782.)

9. After a party has denied an express trust, in a suit to have the trust declared, and after the trust and the terms thereof are in writing proved to the satisfaction of the court, it is proper to put the trust property into the hands of a receiver. (p. 782.)

Johnson, President, furnishes the following statement of the case:

The plaintiffs filed their bill in March, 1882, in the circuit court of Wood county against Z. Warner, W. H. Wolfe and Samuel Stewart. The bill alleges, that J. B. McCandless was the owner of one undivided half of oil-lease No. 58 at White Oak in said county, and that afterwards Susannah McCandless, the wife of said J. B. McCandless, sold her house and lot in Parkersburg, her own separate property, and bought the other undivided half of said lease; that the property was valuable for the petroleum thereon, which was of a superior grade; that in operating said oil-lease defendants had incurred debts, for the payment of which on January 9, 1876, they executed a deed of trust to Samuel Stewart, trustee, conveying said leasehold property. The debts to be secured are mentioned in a schedule attached to

said deed, and amount to about $2,500.00; the said debts before the sale under said trust amounted to about $1,200.00.

Complainants had great confidence in Rev. Z. Warner, who was pastor of the United Brethren Church in Parkersburg, of which they were members, and especially did the complainant Susannah McCandless so confide in him and a short time before said sale sought an interview with him, for the purpose of seeking his advice and suggestions, touchnig their financial troubles and threatening embarrassments. Complainants explained to him fully the situation of their affairs, and he expressed for them his profound sympathy, and promised to take their matters under advisement and do, if he could, something for their relief. At a subsequent interview with the Rev. Mr. Warner, he reported the result of his deliberations touching the premises, and said he could, as he thought, so manage, as to save to complainant, Susannah McCandless her half of said property, and expressed himself particularly anxious to do so inasmuch as the debt for which her property was liable was not a debt of her contracting. He then proposed to become the purchaser himself at the trust-sale, and to buy in one half of the property for and on behalf of said Susannah McCandless. He told Susannah that he could get Bro. D. Needham, who was mentioned in the schedule, and whose debt amounted to $385.00, to wait for his debt for a time; that he had already arranged with W. H. Wolfe, or with Wolf & Stewart, to take one half of the said property which he proposed to bid in in his own name, provided the property did not sell for more than $1,000.00; that with one-half the purchase-money he could pay off nearly all the residue of the debts; that said Susannah corresponded with said Needham, who was a friend and member of the same church, and he agreed to wait for his money six, twelve and eighteen months, and accordingly such arrangement was made, and Warner was to hold one-half of the property and pay off the debts, and then turn over the property to the said Susannah. Warner became the purchaser at $1,050.00 at the trust-sale made on the first day of August, 1877, and a deed was made to him, a copy of which is exhibited with the bill; and said Warner conveyed to W. H. Wolfe, or to Wolfe & Stewart, one undivided half of said property for the consid-

eration of $525.00, one half the said purchase-money; that at the sale of said property J. B. McCandless requested said Warner to postpone the sale for a week in order that he might find a purchaser who would pay more money for the property, and that Warner replied that Wolfe & Stewart had already agreed to take one half of the property if it did not go for $1,000.00 or a little more, and that he had already bid $50.00 more, and declared then and there that he was not buying the property for himself, but was buying one-half for Wolfe, or Wolfe & Stewart, and one half for Mrs. McCandless; that after said sale Warner, Wolfe and Stewart proceeded to work and develope said property, and have produced about 3,000 barrels of oil above the royalty and have sold the same at remunerative prices, at an average price of not less than $3.00 per barrel, one half of which belongs to the female plaintiff, after deducting expenses etc.; that some time after the sale said Warner professed to be acting in good faith and expressed his anxiety to have the property disencumbered from debt so that he could turn it over to the female plaintiff. That of the proceeds he has paid the female plaintiff about $300.00. The bill exhibits a number of letters which it charges were written by the said Warner with reference to said sale and management of said property, which are filed with the bill, marked one to fourteen, inclusive, except No. 12, written by Needham. The bill also sets out the substance of these letters.

The bill charges, that the property has paid the debt and expenses, and that Warner, the trustee, is largely indebted to the female plaintiff; that the facts and circumstances set forth in the bill constitute said Warner, trustee, for said female plaintiff; that he has refused to make an exhibit of his accounts and now denies that he is trustee for said female plaintiff. The bill makes the said Warner, W. H. Wolfe and Samuel Stuart, defendants and prays, that said Warner be required to answer and say how much oil has been produced from said lease No. 58 since the sale under the deed of trust, and show the monthly productions; that he furnish an accurate statement of the grades of the oil so produced and the amount of each grade; also an accurate statement of money actually expended in operating said well with the proper vouchers

therefor; also a statement of the sales of oil, to whom sold, the prices for each lot sold, and what he has done with the money; that he disclose how much of the Needham debt has been paid by him and when paid, and that he further state in what manner he has been acting toward said property, and for whose benefit he claims to have been acting, and further say how much oil is now on hand. The prayer of the bill further is that Wolf and Stewart in their answer say whether one half of said property, about the time of the sale under the trust-deed was not conveyed to them, and if so, why the deed was not recorded, and that they be required to file said deed with their answer, and also state the amount of oils received by them from said lease, the grade, to whom sold, and at what price, and what has become of the half belonging to the female plaintiff. The bill still further prayed that Warner be required to fully account for all moneys that have come to his hands by virtue of the premises, and be required to turn over the same together with one half of said leasehold property to the female plaintiff, and that a receiver be appointed to take charge of said property, that is, one half of said leasehold property and all that property connected therewith claimed by said Warner; and for general relief.

Such of the said letters exhibited with the bill as we think material in the decision of this cause are here inserted. No. 1 was written on the seventh day of August, six days after the day of sale, and was written to Mr. Needham, one of the creditors, to get an extension of time on the debt due him. The letter is as follows:

"Parkersburg, W. Va. Aug. 7, 1877.

"D. Needham, Esq.:

"My Dear Friend:—The McCandless property has been sold under the trust, and I bought it in for $1,050.00; this is less than the debts amount to. I bought for the purpose of securing half the property for Mrs. Mack; the other half another party has taken. Now that all the debts may be paid, it is necessary to do two things: 1. Repair the old wells and bore a new one. This all can be done in three or four weeks. If we get a four barrel well, as we very likely will, and the price of oil continues as now, all the debts can be paid in less time than one year. If you desire it, we will

give you a mortgage on Mrs. Mc's half, you sending a release of the present mortgage. The property is in the hands of a first rate business man who will get all out of it there is in it. Hoping you will understand the state of the case and that I shall hear from you soon,

"I am yours truly,

"Z. Warner."

"Parkersburg, W. Va. Feb. 8, 1879.

"D. Needham, Esq.:

"Dear Bro.:—Yours received; the reasons I did not write you sooner I was trying to sell some oil so as to send you some money, but the cold weather shut us up so that we could not deliver it, and now that we have sold, it is on 90 days time. I will now tell you of a matter that I have not mentioned before for the reason that I wanted you, if possible, to get all your money. It is this: The property sold for only eighty per cent. of the principal of the debts, and on that account no one has received more than $80.00 on the hundred; this would give you $300.00, or about that. We intended if we could to pay the full amount; whether this can be done or not is an open question. I have consulted Mrs. McCandless and we have agreed to propose this, and you can use your own pleasure as to accepting: I will borrow if I can $300.00 and give you for the note, and if the price of oil should ever improve so that Sister Mac can do it, she will pay you $75.00 more. I make this proposition for two reasons:

"1. I infer that you need your money very much, and I suppose that $300.00 would be worth more than $400.00 reaching out over eighteen months.

"2. The price of oil is so low that it is doubtful in my mind whether we can get out inside of three years. Now understand me, if you are not favorable to this, say so, and I will be entirely satisfied. I want to do what will be best for all parties. Please let me know what I shall do at once.

"Yours truly,

"Z. Warner."

Parkersburg, W. Va., Sept. 15, 1880.

"D. Needham, Esq.:

"My D'r Sir:—Yours received and contents noted, and cannot say I am surprised. You likely misunderstood my

letter. I did not mean that you would not get more than $25.00, but I cannot say that any oil interest is "perfectly good for a hundred dollars or more." I might say that it would be likely to be good for that. When I wrote to you in 1877 what I did, there were several things I did not know:—1st, the power of oil rings to control the price of oil; 2d, that our oil would drop from $3.50 per barrel to $1.25; that we would have to bore a new well at a cost of $800.00; 4th, that notwithstanding this, our production would fall off one-third. In addition, I have paid nearly $300.00 to Mrs. McCandless; if I had not paid her anything you would be paid. Yesterday her son was after me again for money; will you say now to me that I shall not give her any more until your debt is satisfied? I will obey you; or you come down and I will turn over the property to you and step out and let you manage it. The experience you will get will be valuable. The first lesson you learn, that six months of the year the property does not pay expenses; we have 114 barrels of oil on hand; we are trying to sell it; when we do I will send you my share of the proceeds; more than this I cannot do.

"Yours respectfully,

"Z. Warner."

"Parkersburg, W. Va., April 15, 1881.

"Sister McCandless:—I have been led to believe by statements coming to me from different sources that you are not only dissatisfied with but think I am dishonest in the management of this oil interest. How far these statements are authorized by you I have no means of knowing, and shall not pretend to determine, nor do I intend to make any *denial* of any things that may be floating among the people, except to say the most foolish thing I ever did in my life was to buy a run down oil property, $2,000 in debt, with the price of oil controlled by heartless *capitalists*, and hope to make any money inside of ten years; again I do not feel that I have any right to expose myself to unkind criticism without any benefit to myself. You have received over $300.00 of money that you would not have received if I had not bought the property. Now one of two things will occur, either I must be free from unkind criticism or I will sell the property, finish paying the debts and if there is any surplus left,

turn it over to you and have nothing more to do with it; in this matter I am determined.

"Respectfully Yours,

"Z. Warner."

"Chicago, Ill., April 26, 1881.

"Rev. Z. Warner, Parkersburg, W. Va:

"Your postal, April 22 received. My claim is of such a nature as justifies me in demanding from you an itemized statement of receipts and expenditures since you took possession of that property. I am not satisfied with the general statement which you make, but want something specific. What I have done with reference to my claim by way of extension of time was done for the purpose of benefiting Mrs. McCandless and for no other purpose. This fact gives me a right to know whether or not she as well as myself are being fairly and honestly dealt by. The time has come when this matter must be satisfactorily adjusted or I will seek my remedy in the courts.

"Yours truly,

"D. Needham, G. S. N."

"Parkersburg, W. Va., May 6, 1881.

"D. Needham, Esq.:

"Dear Sir:—Yours of recent date received. You seem to think that I am both dishonest and untruthful; this is your privilege. I have no authority to give you an itemized statement of the business of a company. What I have decided to do is to borrow the money and pay you off and sell the property to get out of this trouble. I do not intend to be annoyed any longer. On the 9th instant, I start to Iowa; will be in Chicago the night of the 10th at the Briggs House; as soon as I return from this trip will close this matter out in the way I have stated.

"Yours as ever,

"Z. Warner."

Z. Warner answered the bill and among other things said:

"Respondent, for further answer, says that it is true he reported the result of his deliberations to Mrs. McCandless respecting said property and the indebtedness against it; respondent said to her that as she had joined her said husbund in executing said deed of trust, he saw no way to save her

interest in said property; but it is not true that respondent said to her that he thought he could so manage as to save her half, nor did he express to her any reasons for so doing, as alleged in the bill, nor did respondent know what benefit, if any, complainant Susannah received from said oil property.

"Respondent denies that he ever proposed to the said Susannah to become the purchaser of her interest in said property at said sale or the interest of her husband for her benefit. Respondent had not in fact thought of buying the property until the day of sale, and respondent was not in a condition financially to purchase property without aid, and it was not until after the trustee had actually commenced crying the sale of the property that respondent saw his co-defendant, W. H. Wolfe, and in a conversation with him about the sale of the property learned that he would take a half interest in the property at the price of $1,000.00, and he finally consented to take a half interest if respondent would buy the property at $1,050.00.

"Respondent then went to the court house where the trustee was offering the property for sale at public auction, without having determined whether to bid on the property at all; but respondent did bid $1,050.00 for the property, and it was knocked off to him by said trustee at that price; and respondent did not mention to complainants, or either of them, either before or at the time of his purchase of said property, that he could or would purchase said property, or any part of it, or that he had any idea of such a thing. And responded did not before or at the time of or since said sale make any arrangement or have any understanding with the complainants, or either of them, that he would purchase or hold the said property, or any part thereof, for the benefit of the complainants, or either of them, and every such allegation contained in said bill, no matter in what form alleged, is hereby positively and emphatically denied.

"Respondent, soon after said purchase, at the instance of said W. H. Wolfe, assigned and conveyed a one-half interest in said property to said Wolfe and Samuel Stewart; the latter being an experienced oil producer, was induced by said Wolfe to take a quarter interest in said property, but some

years—since said Stewart sold his interest in said property to said Wolfe.

"Respondent, further answering, says that very soon after purchasing said property he told complainants of the arrangements he had made with said Wolfe and Stewart, and he told the female complainant that inasmuch as she had lost all her separate estate by investing in this oil property, respondent would do the best he could with the property to make it pay the debts, and that he intended that any profit which could be made out of the property should be given to her to aid her in supporting her family; that he did not purchase said property for the purpose of speculation or profit to himself but with the hope of being able to help her.

"Respondent was poor and had no money wherewith to pay for said property and could not have bought it but for the aid of said Wolfe; that said Wolfe and Stewart took one-half of said property at $525.00 just what respondent bought it at, and respondent had to borrow the money to pay for his half. Respondent knew that said D. Needham, who was one of the largest creditors secured by said deed of trust, was a warm personal friend of the complainants, as well as of this respondent, and he thought said Needham would be willing to wait for his money, which would save respondent the trouble of borrowing it of some one else to pay him; and under these circumstances respondent requested said complainants to ascertain if the said D. Needham would not wait for his money until he could realize the money out of the proceeds of the oil produced from said property, and the said Susannah corresponded with him, and the said Needham agreed to wait for six, twelve, and eighteen months; but, as respondent has before stated, this conversation was had with the said Susannah after he had purchased the property; and respondent here repeats his denial that there was any arrangement between him and the said Susannah, expressed or implied, whereby he was to purchase the property and hold the same for her use and benefit, as alleged in the bill, nor that when he should have paid off the debts against the property, that he would then turn over the alleged half interest to her. Respondent told the said Susannah that if he was successful in paying off the indebtedness against the property—knowing as he did the

destitute circumstances of herself and family—that he would aid her as he could from the profits of the property, and respondent says that he has kept his promise in this respect in every particular, as will be more fully shown hereafter."

He denies the alleged conversation with J. B. McCandless at the sale. He denies that he stated to divers persons or to any person, that he had no interest in said property except as trustee for the female plaintiffs, and then proceeds as follows:

"Respondent answers that he has always acted in good faith towards complainants; that he expressed anxiety, it may be to have the property he bought relieved from debt, but not for the reason alleged in the bill that he might turn over to said Susannah any portion thereof, and which he had never agreed to do.

"It is true, as alleged in complainants' said bill, that respondent has given to said Susannah, out of the proceeds of said oil property, divers sums of money, amounting in the aggregate to about the sum of $300.00, as he told the said Susannah after he bought the said property he would do if he could get the debts paid which he had assumed in buying the property, and respondent says that he has always held out to the said Susannah his intention to assist her as he could out of the proceeds of said property, and had when he bought the property, and now has, great sympathy for her; and respondent now professes himself as willing and intending to observe his charitable intention, as expressed to said Susannah, to give her such sums as he could out of the profits derived from said property, if any profits could be made, and respondants whole desire and intention was, when he made up his mind to buy the property, that by doing so he might be able to aid the said Susannah by giving her some of the proceeds if any there could be saved out of said profits.

"Respondent says also that if he had not bought said property, the said Susannah would not have received the $300.00 which he had voluntarily given her, or anything else from said property; and if he had not incurred great risk and responsibility in putting down a new well, said property would never have paid the debts against it and said Sus-

annah would not have received the aid she has had from respondent.

"Respondent says that he undertook to pay off the Needham debt in six, twelve and eighteen months, but he denies that he undertook to do so for complainant, Susannah, under the arrangement alleged in the bill, and respondent believes that he would have been able to do so if he had not at the instance of said Needham, and with his consent, let Mrs. McCandless have various sums of money, as respondent had informed said Needham that when the debts against said property were paid he intended to help Mrs. McCandless out of the proceeds of sales of oil produced on said property if anything could be made; and respondent says that he did let her have at various times small sums of money, amounting in all to about $300.00, as herein alleged, and some of these sums he paid her out of his own pocket and when he had no money derived from sales of oil with which to give her any assistance. It is true, as alleged in complainants' bill, that he had a correspondence with said D. Needham in reference to his said debt, and that he wrote the letter of August 7, 1877, but respondent says that it was a confidential communication between him and said D. Needham, and was in answer to a letter from said Needham to respondent, and was intended to express respondent's private purpose which he entertained at the time he bought said property, and still entertains, to aid Mrs. McCandless out of the proceeds thereof, and of which respondent is advised the complainants can take no advantage either at law or in equity. Respondent says that in his reference to Mrs. Mac.'s half, he used the language as a convenient reference to the proportion of said property which he had retained himself in making a sale to his co-defendants Wolfe and Stewart, and as responpondent knew he could better indicate to said Needham what proportion he proposed to mortgage. Respondent denies that he ever regarded himself, and he denies that any of his letters indicate that he regarded himself, as the agent of said Susannah or as acting for her in relation to said property.

"Respondent answers that the law of which complainants are advised respecting confidential relations, he is advised is

good law; but he denies that he in any respect sustains any confidential relations to said Susannah or J. B. McCandless; and he denies that there is any contract between himself and complainants; and he denies that said complainants ever placed any such confidence as they charge in respondents, or that he has taken advantage of them in any respect or that they have been enjoined or prejudiced thereby. Respondent does not claim to own any interest in said property except what he bought at said sale and reserved in his sale to said Wolfe and Stewart; and he denies that said Susannah has any interest therein, or the proceeds thereof, or that he ignores any rights whatever of complainants, therein; for respondent answers that they have no rights or interest therein whatsoever. Respondent denies that complainant, Susannah, has any interest in said property or the profits thereof; and he denies that the expenses of operating said property have all been paid. It is true the Needham debt has been paid, and that the money respondent borrowed, as he has before answered, has been paid, and that all the royalty oil has been paid, but respondent has been obliged to borrow $150.00 to discharge the Needham debt and the original loan for the payment of the purchase-money, which still remains unpaid. Respondent denies that he is in any manner indebted to said Susannah. He denies that he has perpetrated any fraud upon her rights, or that he has fraudulently with-held from her any sums of money belonging to her from proceeds of said oil property or otherwise. Respondent denies that he is or can be in any way constituted agent or trustee of said Susannah, as alleged in the bill, or that he ought to be required to make any exhibit of his private affairs to her; and he denies that he has committed any fraud in not doing so."

He files an account of the production and sales of oil, expenses, &c., the conclusion of which is here inserted:

"1879. Brought forward.			$6,379 99
Aug. 6—Sweetzer Oil Co,.....bbls.	99.74	$124 68	
Nov. 17— " " " ..... "	94.56	458 62	
" 25— " " " ..... "	53.12		
		202 50	
		165 00	
			950 80

Am't rec'd on oil sold of which defendants cannot learn to whom it was sold, and of which no account seems to have been kept.....		316 25
		$7,644 04
"EXPENDITURES.		
"To gross amount for putting down new well and other necessary improvements and expenses.....	$6,101 25	
"To paid purchase-money and interest to date	1,157 20	
"To coal bill not presented and unpaid.....	281 00	
"To amount given to Mrs. McCandless.....	290 00	
"To bills outstanding and due other than coal bill.....	219 00	
		$7,948 55
		304 15

"Oil on hand in tank April 1st, 1882, 251 bbls."

W. H. Wolfe answered the bill; but Samuel Stewart did not. A number of depositions were taken, and on December 23, 1882, the cause was heard on the bill, the answers of Warner and of Wolfe with general replication, and depositions filed, and an issue was directed: "Whether or not the said Z. Warner, the defendant, agreed to and with the said complainants J. B. McCandless and Susannah McCandless or either of them, that he would buy the oil-property in the bill and proceedings mentioned at the trust-sale of the same, and that he would hold one half of said property for the use and benefit of the said Susannah McCandless, until he could out of that half pay off the money borrowed to pay for the same and other debts including the Needham debt, and then turn the said one half of said property over to her." The issue was tried, and on December 20, 1882, a verdict thereon was rendered, that such agreement was made. Two bills of exceptions were saved to rulings made during the trial of the issue. On January 2, 1884, a decree was entered in accordance with said verdict, and the court held that when said Z. Warner purchased said property, it was so purchased for the female plaintiff Susannah McCandless and that he held one half of said property in trust for the said Susannah McCandless, and that as such trustee he should be required to account, and referred the cause to a commissioner for such account to be taken.

From this decree the said Z. Warner appealed.

Cole & Miller for appellant.

Loomis & Tavenner for appellees.

Johnson, President:

The depositions show, that Warner many times stated, that he had bought one half of said property for Mrs. McCandless. Mrs. McCandless in her deposition shows clearly and conclusively, that she wrote the letter of which Warner speaks in his answer, and sent it to Mr. Needham *before* and not after the sale, and exhibits the letter, which she says Mr. Needham handed to her to be used in this suit. She says: "The property was purchased by Dr. Warner to secure the one half for me. When I knew the property would be sold, I saw Dr. Warner and asked him if he could in any way secure my half for me. I told him I could take care of the Needham claim myself. On leaving he said he would see what could be done on the day of sale; and after the sale he told me he had bought the property to secure my half; said he would take care of it until the debts were paid, and then hand it over to me. I wanted him in some way to secure my half. I do not remember all the conversation, but I remember that distinctly, for that is what I wanted when I told him I would take care of the Needham claim; he told me to write to Mr. Needham, and see if he, Mr. Needham, was willing to give me time. I wrote to Mr. Needham July 29, 1877, as suggested by Dr. Warner and file herewith, the original letter that I so wrote to be filed herewith as a part of my deposition, marked 'No. 1, Mrs. S. Mc.' I am not confident it was sent the day it was written, but it was sent before the sale; he did not expect an answer until after the sale, but it was promptly answered, which answer was duly received, and was turned over to Z. Warner, in which he, Needham said he would give six, twelve and eighteen months, if the claim was secured. Dr. Warner read the letter and said it was all right." On cross-examination she says, that it was on the day of the sale, that Warner came to her and told her he had bought the property in to secure one half for her, and would take care of it for her, until it was paid for, and then would turn it over to her.

J. B. McCandless in his deposition says: "On the morning of the sale, and after the property was bid to $1,000.00, or about that, I asked Dr. Warner to aid me in having the sale adjourned for one week, as there were parties present who said it would require that length of time to get ready to make the purchase of the property, stating they would bid it to $1,600.00 or $1,700.00 if they got that length of time. Dr. Warner answered in substance, 'I have made arrangements,' or 'have a plan,' I do not remember which, 'by which I expect to save Mrs. McCandless her half of the property,' but answered further, 'I will see Mr. Wolf about getting the sale adjourned.' He said, 'I have bid as high, or exceeded the bid, they allowed me to bid, but if they are satisfied to allow the sale to be adjourned, *I am up to this.*' I did not know who was meant, other than Mr. Wolfe. After seeing Mr. Wolfe he told me that he, 'Wolfe would not allow his bid to stand if the sale was adjourned over for one week,' but he, Warner, told me he 'would go with me to Mr. Stewart and see what he would do in the matter.' The sale now being adjourned over nntil after dinner we went together to see Mr. Stewart, (Mr. Samuel Stewart was the trustee making the sale;) on the way out to Mr. Stewart's together, I learned that Mr. Wolfe and Mr. Stewart were the parties who were going to take one half off Mr. Warner's hands, Mr. Warner retaining the other half for Mrs. Mc. I mean by Mrs. Mc. Mrs. McCandless. I learned of this arrangement principally from Dr. Warner himself. The conversation carried on between Mr. Warner and Stewart, was to that effect, or rather seemed to be understood. Shortly after the sale, it may be the same evening of the day of sale, or shortly after at least, Dr. Warner told me he thought that with the management of Stewart and Wolfe, he would be able to pay the Needham claim, and the money he had borrowed to make the purchase, within a year or thereabout, and turn over the property to Mrs. Mc."

R. J. A. Boreman says: "I was present at the sale. R. H. Thomas and my father knowing from an advertisement in the paper that the property was to be sold that day had talked the matter over and concluded to purchase. A short time after the bidding commenced, and both Mr. Warner and our-

selves had several bids, he came to where R. H. Thomas and myself were standing and requested us not to bid any more as against him as he was buying it in not for himself, but for Mrs. McCandless. We at once stopped bidding and upon the next bid which was his own the property was knocked down to him by Stewart at I think $1,035.00. * * $1,600.00 is what we concluded the property was worth, and to that amount we would have gone."

R. H. Thomas says: "I do not remember of such conversation having taken place in the presence of Dr. Warner. I got the impression from some one while the sale was still pending, that it was being bid off for the benefit of Mrs. McCandless, consequently stopped bidding. My impression was that I got that impression from McCandless. I am satisfied that I was not present at such conversation as detailed in said answer in the presence of Dr. Warner."

W. M. Evans says: "Dr. Warner told him, he purchased one half said property for the benefit of Mrs. McCandless."

To J. V. Mayhall, Warner said substantially the same thing.

C. W. Mayhall, Delia Landley, Ida May Mayhall, in their depositions say: That Dr. Warner in a meeting held in his church at Parkersburg, represented that some of the members refused to pay his salary, because he had oil property; he stated he had no oil property, and had not a foot of oil territory and had simply done for one of his members, what he would do for any of them under like circumstances.

E. W. Staples, clerk of the Volcanic Oil and Coal Company, in his deposition says, he had a conversation with Dr. Warner in the latter part of July, 1877; believes it was on the day the property was advertised for sale under the trust; the conversation took place at Volcano; the conversation was in reference to back royalty due on the lease; he wished to ascertain on what terms the Volcanic Oil and Coal Company would adjust the back royalty provided he purchased the property, as he proposed to purchase the property for the benefit of Mrs. McCandless; his recollection is that he said to him, that he should deliver to the company one third or one half of all oil produced, until back royalty, and royalty on current production was paid; he was also to have the

benefit of any rebates, to which he might be entitled. He also said that as soon as he received from the property what he might pay, he proposed to turn the interest over to Mrs. McCandless.

W. C. Stiles, general agent of said Volcanic Oil and Coal Company in his deposition says: "I had a conversation with Mr. Warner a few days after the sale; he visited me at my office for the purpose of arranging to get time to pay the royalty due on the lease at the time of the sale. I called his attention to the fact that the Volcanic Company was creditor to J. B. McCandless for coal furnished to the amount of about $150.00 and used upon said lease; he then explained to me the terms upon which he had bought said lease, saying that he had bought it for Mrs. McCandless, and that after re-payment to him of advances, one half interest was to revert to her. He promised to pay the Volcanic Company's claim for coal above mentioned, before making over said half interest to Mrs. McCandless. Upon this assurance from him, his application for easy terms on back royalty was acceded to."

W. H. Wolfe says that on the day of the sale, while the sale was in progress, Dr. Warner came to him and asked, if he would take an interest in the property, or buy a part of it. Witness told Warner that, if he bought the property, witness would take an interest with him in it, provided it did not go higher than $1,000.00. After the sale he came to witness and said he had bought the property for $1,050.00. The excess was but small, and he took an interest, for which Warner made him a deed; says there was no arrangment made by him with Warner about purchasing said property before the day of sale."

The deed accompanying Mr. Wolfe's answer shows, that on the eleventh day of August, 1877, Warner, for the consideration of $525.00, then acknowledged to be paid, conveyed to Wolfe and Samuel Stewart an undivided half of said leasehold property.

In Warner's deposition he makes an unsuccessful attempt to explain his connection with said property on the theory that he did not buy the property for Mrs. McCandless. It is hard for him to explain the letter written on the seventh

day of August to D. Needham consistently with his absolute truth and ownership of said one half of lease No. 58. In his answer with reference to that letter, he says: "It is true as alleged in complainant's bill that he had a correspondence with said D. Needham in reference to his said debt, and that it is true that he wrote the letter of August seventh, 1877, but respondent says that it was a confidential communication between him and said D. Needham, and was in in answer to a letter from said D. Needham to respondent, and was intended to express respondent's private purpose which he entertained at the time he bought said property, and still entertains, to aid Mrs. McCandless out of the proceeds thereof, and of which respondent is advised the complainant can take no advantage, either at law or in equity. Respondent says that in his reference to Mrs. Mac.'s half, he used the language as a convenient reference to the proportion of said property which he had retained himself in making a sale to his co-defendants, Wolfe and Stewart, and as respondent knew he could better indicate to said Needham what portion he intended to mortgage."

He would have effected quite as much by his truthful silence, had he not attempted an explanation of the letter of August 7, 1877. As to the declaration in the church he makes this singular explanation in his deposition: "My recollection of times is different from that of others and I do not recollect the form of the statement I made. I was trying to impress on the minds of my people that I needed my salary, having been informed by some of my stewards that some of the members seemed to think that I was getting money out of the oil-property. If I made the statement in the form in which these witnesses say I did, it was because I had not put my own money in the property, intending the property to pay for itself, if paid for at all, and I did not consider it mine until it was paid for."

When asked if he had read the testimony of Stiles and Staples, and if he used the language stated by them in conversation, he said: "At the time referred to by Mr. Staples I had no conversation with him at all, nor had I any conversation with Mr. Stiles in his office a few days after the sale, but some time in October as I now remember, after the new

well had commenced pumping oil, with Mr. Wolfe and Mr. Stewart I was in his office and made arrangements for paying the back royalty. Mr. Stiles claimed a coal bill of nearly $200.00, as being against lease 58, and intimated very strongly that he would give me trouble in court, if I did not make some arrangement to pay it; as a matter of economy, as I considered it, I gave him a verbal promise, that when the debts under the trust were paid, then, I would adjust that matter. I have no recollection of saying that I would not turn the property over to Mrs. McCandless until it was paid."

In answer to the question, whether at any time before the sale he promised to purchase the property for Mrs. McCandless, and whether he had any intention of purchasing the property in any capacity until the afternoon of the day of sale, and whether he had since that time said to her or any one else that he had bought the property for her and intended to turn it over to her when the debts were paid, he answered: "I had no thought or intention of buying the property for Mrs. McCandless or any one else, until after 12 o'clock on the day of sale according to the contract between Mr. Wolfe and myself. In the evening after I bought the property, I told Mrs. McCandless that I had bought the property and sold one half of it to Mr. Wolf; that while I should keep the other half in my possession, I intended to give her all the benefit I could, provided I could make the property pay its debts. There were no arrangements with her before the sale for me to buy the property for her." In that connection he further said that he had no knowledge of Mrs. McCandless asserting any claim to the property, since the sale, until she brought this suit. This statement does not agree with his letter to Mrs. McCandless dated April 15, 1881, above copied. He flatly contradicts R. J. A. Boreman and says further: "Mr. Boreman came to me,—I knew some one was bidding,—and asked me if I was bidding on the property. I told him I was. He said then he would not bid any more. I told him I hoped he would bid. That is the substance of it." Dr. Warner in this statement is not sustained by the facts and circumstances of the case, while Mr. Boreman's statement is so sustained. Boreman's statement is probable,

while Warner's is not. In answer to the question, whether Mrs. McCandless before the sale did not send for him, and whether he did not go and have a conversation with her, about her pecuniary embarrassments which involved the property, he answered: "She came to my house, and stated that the property was advertised to be sold, and if sold she would lose everything that she had, and asked me if I could not help her in some way. I told her I thought I could, being under the impression, and not asking her, that she had not signed the trust, and said I thought I could save it to her. At her request I went to see Mr. Stewart, and in the conversation with him I learned that she had signed the trust. I then went to see her, and told her, that there was but one way that I could see to save anything and that was to get some friend who was engaged in the oil-business to run the property on the day of sale as far as possible above the debts."

It certainly would not take a very shrewd man to know, that a person's property was not in much danger of being lost under a trust-sale, if the party had not executed the deed of trust. Again if the brotherly suggestion to get some friend to run the property above the debts as much as possible, was really made, its hypocrisy becomes quite apparent, in view of the fact, that parties were there who would have given $1,600.00 for the property but were induced not to bid against Mr. Warner, because he represented that he was bidding it in for this same woman and *sister*, whom he says he was trying to befriend.

Being further asked the question, "Did you not propose to be that friend to buy the property for her. He answered, "No Sir." Further, "Did you consider yourself the owner of that property after you had bid it in." Answer, "I did, and as having a right to do as I pleased with it, and would not have bought it under any other consideration." This direct question was put to the witness:

"Did you not buy that property for and on behalf of Mrs. McCandless; and have you not publicly so stated on divers occasions, both orally and in writing?"

He answered: "I bought the property with the thought in my mind, that if I could make it pay the debts, that I

would out of the after proceeds give to Mrs. McCandless such amounts as I could. I did not buy it as her agent."

The further question was asked him: "Did you not buy the property for Mrs. McCandless?"

He answered: "I bought it for her in that sense, with the secret purpose that if I could pay the debts, that I would give her such benefits of the proceeds as I could, and I proposed after compensating myself for my trouble and expense, to give her such benefit as I could."

If a trust of the kind sought to be set up in the bill in this cause could be proved by parol, I would have no hesitation in saying that it is clearly proved in this cause, that Z. Warner after said sale held one half of said leasehold-property in trust for the female plaintiff, and that, when it was cleared of the debts, and the trustee compensated, it should be turned over to Mrs. McCandless. Whether a party who obtains a deed for valuable consideration, but agrees by parol with the grantor, at the time the deed is made, that he will hold the land in trust for third parties, can have such trust enforced in a court of equity is questionable. (*Troll* v. *Carter*, 15 W. Va. 567.) In that case the question was discussed, but not decided, as it was not necessary. The same question was alluded to and somewhat discussed in *Tichenell* v. *Jackson & Feather*, *supra*, 460, but was again waived, as its decision was not necessary for there was a written agreement between the parties. The agreement was somewhat vague, but with the surrounding circumstances it was held to mean, that the purchaser at the sale, held the land so purchased in trust for the former owner. In that cause we held that if a conveyance be made by A. to B., and at the same time and as a part of the transaction B. executes a writing wherein he declared he purchased the land in trust for C., this constitutes an executed, an express trust and is valid, though C. gave no consideration whatever for being thus made *cestui que trust*.

In *Troll* v. *Carter*, 15 W. Va. 567, the *quære* was propounded: Does the omission in our statute of sec. 7 of the English statute of frauds have any effect? That *quære* we will not answer in this case, but will treat the cause as if the said seventh section were in full effect in this State. The instrument in writing required by the statute may be in terms less

formal than would be required for the creation of a trust, and the making of it is to be regarded as an entirely independent transaction. It has been held that it may be executed subsequently to the creation of the trust, or even in anticipation of it; or it may be executed subsequently to the death of the grantor. (Browne on the Statue of Frauds, sec. 97.) Letters under the hand of the trustee, distinctly referring to the trust are sufficient manifestations or proof to satisty the statute. (Browne on the Statute of Frauds, sec. 98.)

In *Stare* v. *Stare*, 5 Johns. Ch'y 1, cited by counsel for appellant, it was held, that a trust need not be created by writing; yet to take the case out of the statute of frauds its terms and conditions must be clearly manifested and proved in writing under the hand of the party to be charged. In that case the trust was sought to be proved by letters, but the court held them too vague and indefinite to prove the trust.

In *Forster* v. *Hale*, 3 Ves. 696, it was held, that the statute of frauds requires not that a trust shall be created by writing, but that it shall be proved by writing which may be subsequent to the commencement of it. When letters are to raise a trust there must be demonstration that they relate to the subject. In that case a trust was proved by letters, which it seems to me, were much more vague and indefinite than the letters relied on here. This case was affirmed in 5 Ves. 308.

In *Deg* v. *Deg*, 2 P. Wms. 412, it was held, that where A. receives a sum of money, which he covenants to lay out in land to be settled for certain ones, and afterwards purchases an estate, which he does not settle, but does by writing own that this purchase was made with the trust money, this binds the estate and is a declaration of trust.

In *Wilford* v. *Beazley*, 3 Atk. 503, it was held that where there is a complete agreement in writing, and a person who is a party and knows the contents, subscribes it as a witness only, he is bound by it, for it is a signing within the statute.

In *Smith* v. *Mathews*, 3 D. G. F. & J. 138, it was held that when the court is called upon to establish, or act upon a trust of lands it must not only be manifested and proved by writing signed by the person enabled by law to declare the trust, that there is a trust, but it must also be manifested and proved by writing signed as above what the trust is. In

that case it was held that the letters and other writing were insufficient to declare the trust.

In *Hutchinson* v. *Tindall*, 2 Green ch'y. 357, it was held that a declaration of trust requires no formality, so that it be in writing, and have sufficient certainty to be ascertained and executed; and it is not material whether the writing be made as evidence of the trust or not. That where a deed is absolute on its face, and without any actual consideration paid, if the grantor seeks to set it aside on the grounds of fraud, the answer of the defendant setting up a trust, unless directly responsive to the bill, will not be evidence of the trust; but where the grantor files his bill, claiming the deed to be a deed of trust, and the defendant by his answer admits it, the answer, it seems, will be good evidence of the trust, and a sufficient writing to support it.

Where a firm which had an account against A. B., brought an action and received judgment thereon, and land of A. B., was sold under the execution and bid off by W. F., one of the partners in his own name, but with an understanding between him and his partner that he "should account with them for the interest in the land at its reasonable value;" and on the account of A. B., in the book of the firm, the expenses of the action and sale were charged and the rents of the land credited to the partnership. On the dissolution of the firm C. S. to whom the firm was indebted, requested the partners to convey the land to him in discharge of his debt. W. F. wrote in the margin of A. B's. account in the firm's ledger. "To W. F. he to pay C. S." and the other partners assigned to C. S. in writing their interest in the land. The accounts between the partners were afterwards settled. Held on a bill in equity filed by C. S. against W. F. to compel him, W. F. to convey the land to C. S. that there was no trust on the land in the hands of W. F. in favor of the other partners, or of C. S. *Homer* v. *Homer*, 107 Mass. 82, Morton J. for the court said: "The memorandum on the ledger of the firm is entirely insufficent as a declaration of trust. It does not describe the land; if it is deemed to refer to the land, it does not indicate an intention to hold it in trust; but the more natural import of its language is that the defendant is to hold the land as his own, and pay the plaintiff for his services."

A. conveyed his land to B., to whom he was indebted, by an absolute deed, and B. at the same time promised orally to convey or pay to A. any surplus that might remain of the estate or its proceeds after discharge of the debt. B. afterwards told A. that he had made a memorandum to the same effect but never delivered it to him. On B's death there was found among his valuable papers, a writing, signed by him not addressed to any person by which he "did agree and bind" himself to pay the above mentioned surplus to A. Below this writing was the following, also signed by him: "This memorandum is made for the use of my executor or administrator only; A. has no legal or equitable claim against me or my estate, but on payment of my debt, any balance shall enure to A's benefit." *Held*, that there was a declaration of trust in writing within the meaning of the statute. (*Wrann* v. *Coats*, 109 Mass. 581.)

Barrell v. *Joy*, 16 Mass. 221, was an appeal from probate, in which the probate court had passed a decree directing Joy to render an account as executor of the last will of Joseph Barrell, deceased father of complainants. In his capacity as executor Joy had charged himself with but a small amount of property, claiming to hold all the residue of the estate and effects which were once his testator's as his own estate and property by virtue of conveyances and assignments made to him by the testator in his lifetime, for a valuable consideration. The complainants contended that the property was assigned by the testator, and received by Joy under a confidence and trust between the parties; that after indemnifying Joy for all his lawful claims upon Barrell, on account of debts paid and liabilities assumed for him, the surplus if any should be accounted for to Barrell; and that they as his heirs were now entitled to call him to account, in order that he might be charged, as executor for any balance remaining in his hands. The conveyances of the property from Barrell to Joy were absolute; and it did not appear that there was any bond, covenant, or other declaration in writing, made at the time and tending to show the purpose and intention of the parties to the transaction. But to prove Joy to have received the conveyances in trust, the complainant relied on an indenture made in the lifetime of the testator, and after the said

conveyances, between Joy on the one part, and Jones, Jeffrey and Barrell on the other part, in which Joy covenants to sell sundry of the estates so conveyed to him, and appropriate a certain part of the proceeds thereof to the discharge of certain claims of the said Jones and others against Barrell. They also produced with the same intent a pamphlet printed and circulated by Joy in answer to one issued by the complainants, in which Joy alludes to the original conveyances as made to him in trust for the testator. Parker, C. J., said:

"The conveyances and assignments were on the face of them, absolute and unqualified; so that, if a trust was intended, it was of a most confidential nature, and exceedingly difficult of proof, if the trustee had chosen to stand upon his strict legal rights, and refrain from any subsequent act, which might show the true character of the transaction. But it seems to be settled by authorities cited at the bar, that any declaration in writing, made by the grantee or assignee of property, at any time after the conveyance, is competent proof that the property was to be holden in trust according to the terms of the declaration, within a fair and liberal construction of the statute of frauds; and that letters or other papers however informal are sufficient to constitute such declaration. According to this principle we must consider the expressions used in the pamphlet published by Joy, in answer to one previously published by the complainants as amounting to an acknowledgment, that the estates and property which he received from Barrell were entrusted to him for certain purposes; and that he was accountable to Barrell for a just distribution of them, and for any balance remaining after the purposes of the trust were fully answered. * * * But there is in this case much more satisfactory evidence of the accountability of Joy, as trustee, than any which can be derived from confessions extorted by a direct call upon him before the public for an alleged breach of trust and moral duty. The indenture made in October, 1797, furnishes conclusive evidence that notwithstanding Joy's legal title to the property therein discribed there was a beneficial interest remaining in Barrell. For it can not otherwise be accounted for that Joy should have consented to appropriate the proceeds, after satisfying his own debt to the payment of the large demand of

Jones, Jeffrey and Russell, against Barrell. The tenor as well as the effect of that indenture shows very clearly that Joy had taken an assignment of the property, solely with a view to secure himself an indemnity for his advances on account of Barrell; and that it was intended and expected by the parties, that when Joy was indemnified, either by payment or by the proceeds of the property on a sale, Barrell's right to the estate, or to the residue of the proceeds, should revert to him. This is a sufficient declaration in writing, for although not made to Barrell, it is available to him, or his representative."

From the authorities we deduce these principles, that if a party obtain a deed for property for valuable consideration paid by him; under sec. 7 of the English statute of frauds it may be shown, that such party holds the property so conveyed in trust for another; that such trust need not be created in writing but must be manifested and proved in writing by the party enabled by law to declare the trust; and such writing must show both the existence of the trust and the terms thereof; the writing to prove such trust need not be made at the time the trust is created, but may be made any time thereafter, and it is not necessary, that it be addressed to the *cestui que trust* or to any other person. Letters after the creation of the trust written to any one, in which the trust and the terms thereof are admitted and declared, are a sufficient declaration of such trust within the statute; and it is not necessary that the trust and the terms thereof shall all appear in one letter or other writing, but if they can be ascertained with reasonable certainty from a number of letters, or from one or more letters and other writings, it is sufficiently proved. In ascertaining the meaning of such writings the court will, if necessary, look to the surrounding circumstances.

Without at all considering the parol testimony in this case, relating to the declaration of trust our right to consider the same not being decided in this cause, we shall have no difficulty under the principles above set forth to dispose of this cause. Mrs. McCandless owned one half of lease 58 and her husband the other half. She with her husband executed a deed of trust on the whole lease to Samuel Stewart,

trustee. The trustee, about the first of August, 1877, sold the property under said trust, and the appellant, Warner became the purchaser. A deed was made to him therefor. A short time afterwards he conveyed one undivided half of the said property, in consideration of $525.00, in hand to him paid, to W. H. Wolfe and Samuel Stewart. On the seventh day of August, 1877, he writes to D. Needham, who was one of the creditors, secured under the trust-deed, telling him that the property had been sold under the trust, and he had bought it for $1,050.00; that he bought it for the purpose of securing half the property for Mrs. Mac; that another party had taken the other half; that the property did not sell for sufficient to pay all the debts, but in order to pay all the debts the old wells would have to be repaired and a new one bored, which could be done in about four weeks. He further said to him: "If you desire it we will give you a mortgage on *Mrs. Mac's half*, you sending a release of the present mortgage." Again on the eighth of February, 1879, he wrote Needham another letter in which he told him that "the property sold for only eighty per cent. of the principal of the debts, and on that account no one has received more than $80.00 on the hundred; this would give you $300.00, or about that. We intended, if we could, to pay the full amount; whether this can be done or not is an open question. I have consulted Mrs. McCandless, and we have agreed to propose the following, and you can use your own pleasure as to accepting: I will borrow, if I can, $300.00 and give you for the note, and if the price of oil should ever improve so that Sister Mac. can do it, she will pay you $75.00 more." In the letter written September 16, 1880, among other things he said: "I have paid nearley $300.00 to Mrs. McCandless; if I had not paid her anything you would be paid. Yesterday her son was after me again for money; will you say now to me that I shall not give her any more until your debt is satisfied? I will obey you; or you come down and I will turn over the property to you, and step out and let you manage it."

To Mrs. McCandless he wrote April 15, 1881, complaining that he had heard as coming from her unkind criticisms; that she was not only dissatisfied, but thought him dishonest "in the management of this oil interest." He further says:

"I do not feel that I have any right to expose myself to unkind criticism without any benefit to myself. You have received over $300.00 of money that you would not have received if I had not bought the property. Now one of two things will occur, either I must be free from unkind criticism or I will sell the property, finish paying the debts, and if there is any surplus left, turn it over to you and have nothing more to do with it; in this matter I am determined." It is very clear from these letters and the surrounding circumstances, that the letters amount to a sufficient declaration of an express trust within the statute; and it is just as clear that that trust was, that Warner, the trustee, should pay the charges against the property by managing it, that is the one half and after this was done, give the property to the female plaintiff, or if he were compelled to sell it, to pay the charges thereon after a reasonable compensation to himself, the trustee, to give the surplus if any, to Mrs. McCandless the female plaintiff. It seems to me that in the settlement of his trustee accounts Warner should be made whole and allowed a reasonable compensation for his troubles. He has acted badly in denying the trust; but I can see no sufficient reason for denying him compensation and it is not supposed the court will refuse it on the coming in of the report. It was proper after he had denied the trust, to put the property in the hands of a receiver.

It is insisted in agrument by counsel for appellant, that there was no consideration for the agreement, if one was made. It being an express trust it required no consideration to support it. (*Tichenell* v. *Jackson & Feather*, *supra* 460.) It is also insisted by counsel for appellant, that no issue ought to have been directed under the settled law of this State governing issues out of chancery. This is true. There was not such a conflict of evidence as made it doubtful, on which side was the preponderance. The bill set up such a trust substantially, as we have ascertained existed, and vouched the letters of Warner to prove it and its terms. The answer does not deny these letters, therefore the court ought not to have directed the issue, but should have pronounced substantially the decree it did render on the verdict of the jury, upon the proofs as they stood at the time the issue was di-

rected. But this is not an error, of which the appellant can complain, as it was not to his prejudice.

There is no error in the decree of the circuit court of Wood county, for which it should be reversed, and it is therefore affirmed.

AFFIRMED.

CHARLESTON.

PHILLIPS & SONS v. ROBERTS *et als.*

26 783
40 706
26 783
50 196

Submitted September 8, 1885.—Decided Nov. 21, 1885.

In a suit to enforce a mechanic's lien, if it appears upon the face of the bill that the suit was not brought within six months from the time plaintiff filed his account with the clerk, as required by the statute, the bill should be dismissed upon demurrer thereto.

The facts of the case appear in the opinion of the Court:

F. Beckwith and *A. W. McDonald* for appellant.

Grove & Brown and *G. Baylor* for appellee.

SNYDER, JUDGE:

Suit in equity brought April, 1883, in the circuit court of Jefferson county by William Phillips & Sons, suing for themselves and all lien-creditors against John W. Roberts and others, to enforce a mechanic's lien for material and lumber furnished by the plaintiffs to the defendant, Roberts, for the erection of a house upon his farm in said county. The bill avers, "that within the time prescribed by law, after they had ceased to furnish materials for said house, the plaintiffs filed their accounts," &c., in the clerk'soffice of said county, and that the "amount of said accounts September 2, 1882, was the sum of $218.02." They exhibit with and make part of their bill a certified copy of the account and affidavit filed and recorded in the county clerk's office. In the account the dates given show, that no material was furnished or charges made after September 2, 1881, and the certificate of the clerk shows that the affidavit attached thereto was sworn

to on October 31, 1881, at which date the account and affidavit were admitted to record.

A number of orders of reference and reports were made in the cause and also a decree for the sale of the defendant's farm, all of which were irregular and improper, but as the bill must be dismissed upon another ground it is unnecessary to notice them. The defendant, Roberts, demurred to and answered the plaintiffs' bill and obtained an appeal to this Court from the orders and decrees entered in the cause.

The material having been furnished by the plaintiffs and their lien recorded in 1881, their rights must be determined by the act of March 8, 1879, which was the statute then in force in this State. The third section of said act declares, that, unless the person desiring to avail himself of the lien therein provided for, shall file his account in the clerk's office *within thirty days* from the time he ceases to furnish material such lien shall be discharged. And the eighth section declares: "Unless a suit to enforce the lien is commenced *within six months* after the person desiring to avail himself thereof shall have filed his account in the clerk's office, as heretofore provided, such lien shall be discharged."—Ch. 84, Acts 1879, pp. 161–2.

It will be observed that there was a period of nearly two months between the date of the last item charged on the account of the plaintiffs and the time they filed the account in the clerk's office, and that it was nearly eighteen instead of six months from the time they filed their account in the clerk's office until they instituted this suit; that is, the account was filed October 31, 1881, and the suit brought in April, 1883. The statute is imperative, that unless the suit is brought *within six months* the "lien *shall* be discharged." It is thus apparent that at the time this suit was brought the plaintiffs had no lien for their claim, and as this fact appears upon the face of the account exhibited with and made part of the bill and therefore upon the face of the bill itself, the appellant's demurrer thereto should have been sustained and the bill dismissed for the want of jurisdiction. For this error all the orders and decrees entered in the cause by the circuit court must be reversed and set aside, the said demurrer sustained and the plaintiffs' bill dismissed.

REVERSED.

CHARLESTON.

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NATIONAL BANK of KINGWOOD *v.* JARVIS *et al.*

Submitted June 9, 1885.—Decided Nov. 21, 1885.

A decree is entered of record confirming a judicial sale, but before the end of the term the said decree is set aside by an order of the court, and at a subsequent term a decree is entered setting aside said sale and ordering a re-sale of the property. HELD:

I. That no appeal lies to this Court from the order setting aside the decree confirming the sale; and

II. Under the decision of this Court in *Childs* v. *Hurd*, 25 W. Va. 530, the purchaser can not appeal from the decree setting aside the sale before the re-sale is made and confirmed.

The opinion of the Conrt contains a statement of the facts of the case.

Martin & Woods for appellant.

H. J. Snively for appellee.

SNIDER, JUDGE:

Under circumstances which it is unnecessary to state in disposing of this appeal, Thomas E. Davis became the purchaser of three tracts or parcels of land sold March 20, 1884, pursuant to a decree made by the circuit court of Marion county in the suit of the National Bank of Kingwood against Granville E. Jarvis and others. By decree of July 7, 1884, the said sale and the report thereof were confirmed without objection or exception; but on July 15, 1884, during the same term of the court, James B. Newlon filed his petition asking that he be made a party to the cause with leave to except to said report of sale and that the sale of one of said tracts might be set aside; the court granted the prayer of said petition and on the motion of Newlon set aside so much of the decree of July 7, 1884, as confirmed the sale of the one tract so excepted to by Newlon and continued the consideration of the confirmation of the sale of said tract to a future term. On December 17, 1884, the court, upon consideration of the exceptions filed by Newlon and the defendant Jarvis

to the report of sale and the affidavits in support thereof, the upset bid of Newlon, and also upon the motion of the purchaser, Thomas E. Davis, to confirm the sale of said tract so excepted to and affidavits filed in support of said motion to confirm, entered a decree overruling the motion of said Davis to confirm the sale, set aside the sale of said one tract and directed the commissioner to cancel and surrender to Davis his bonds given therefor and refund to him the cash payment made by him on said tract, and ordered the commissioner to advertise and re-sell said tract of land at public auction, &c. From this decree and that of July 15, 1884, Thomas E. Davis, the purchaser, on February 12, 1885, obtained an appeal from one of the judges of this Court.

The appeal comes plainly within the decision of this Court in *Childs* v. *Hurd*, 25 W. Va. 530, and must be disposed of in the same manner. In that case it was decided that, "the purchaser of property at a judicial sale, which before confirmation thereof has been set aside by a subsequent decree directing the property to be re-offered for sale, can not appeal from such decree before such re-sale has been made and confirmed."

Counsel for appellant, however, undertake to distinguish between that case and this by asserting that this is not, as that was, an appeal from a decree setting aside a sale which had not been confirmed, but a decree setting aside a sale which had been confirmed. It is true, a decree was put upon the record confirming this sale, but it is likewise true, at a subsequent day of the same term that decree was set aside by an order of the court. This order operated as an absolute obliteration of said decree and at the end of the term the record was in precisely the same condition in law and effect, as if said decree had never been entered or had been entirely erased from it. All the rights and effects which the decree might have conferred or had, if it had been permitted to remain on the record, became inoperative and passed entirely out of existence with the decree itself. But it is insisted that the court had no power to set aside said decree. The rule is well settled, that the record on the common law side of the court, during the whole term is looked upon as *in fieri* and in the breast of the court, and therefore subject to such modifications as it may think proper to make. 4 Min. Inst.

Pt. I. (768) 852; 1 Rob. (old) Pr. 638; *Smith* v. *Knight*, 14 W. Va. 749, 759. But this rule does not obtain to the same extent on the chancery side of the court. The rule in chancery proceedings seems to be that, where it appears after a decree has been entered and before the end of the term that by accident, oversight, mistake or misapprehension the decree is erroneous, the court has the power to correct or alter it, but this power is to be exercised with a sound discretion and is by no means arbitrary. 4 Min. Inst. Pt. II (1285); 2 Dan. Ch'y 1028; *Carper* v. *Hawkins*, 8 W. Va. 291.

Assuming, however, that the order of July 15, 1884, setting aside the decree of July 7, 1884, was erroneous, still it is not of itself such an order as could be appealed from to this Court. It is purely an interlocutory order. It does not even set aside the sale, but simply continues the consideration of the confirmation of the sale to a future term. The subsequent decree of December 17, 1884, setting aside the sale and ordering a re-sale is also, as we have seen under the decision in *Childs* v. *Hurd*, *supra*, an interlocutory and non-appealable decree. Before either of these decrees can be reviewed by this Court at the instance of the purchaser, the re-sale must have been made and confirmed by the court. Consequently the appeal now before us must be dismissed as having been improvidently awarded.

APPEAL DISMISSED.

CHARLESTON.

HARGREAVES *et al.* v. KIMBERLY.

Submitted June 23, 1885.—Decided November 14, 1885.

1. A declaration in case for diversion of surface water held sufficient. *Gillison* v. *Charleston*, 16 W. Va. 282, and *Knight* v. *Brown*, 25 W. Va. 808, *adhered* to. (p. 790.)

2. Where evidence is introduced, which appears proper at the time,

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and the court admits it and refuses to exclude it on motion of counsel with the remark: "It will be excluded, if it hereafter appears that it is irrelevant," and the record shows, that it afterwards appeared that it was irrelevant, but no motion was afterwards made by counsel to exclude it, the objection to its admission is waived. (p. 790.)

3. A party has a right to deal with a run on his land, as he sees fit, provided he does not cause the run in its usual condition to encroach upon the property of another. (p. 791.)

4. In repairing, maintaining or replacing the banks of a run on his own land a person has no right to change or narrow the natural course of the run, so as to cause it to encroach upon the property of another and injure him. (p. 791.)

5. Where the record does not show, whether certain instructions made part of the record were given or refused, the appellate court can not consider them. (p. 794.)

6. In an action for damages for diverting water from a run it was not error to refuse the following instruction asked for the defendant: "The defendant is not liable to plaintiffs for any washing, slipping or other injury to their property resulting from an extraordinary and unusual condition of the run." (p. 794.)

7. In an action for damages for diverting water it is proper to ask a witness to state from facts within his own knowledge what in his *opinion* was the amount of damages suffered by the plaintiff because of such diversion of the water; and to authorize the giving of such opinion it is not necessary that the party be an expert. (p. 796.)

8. But it is error to permit a witness to answer in a case like this the following question: "What will be the future damage to the property from the acts of the defendant?" (p. 797.)

9. Where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance and not permanent in its character but of such a character that it may be supposed, that the defendant would remove it rather than suffer at once the entire damage, which it might inflict if permanent, then the entire damage can not be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues. (p. 799.)

10. One trespass can not be set off in bar of another; but where the

damage alleged by the plaintiff is caused in part by the wrongful act of the plaintiff, the defendant may by way of defence under the plea of not guilty prove such wrongful act of the plaintiff in *mitigation* of damages. (p. 800.)

W. P. Hubbard for plaintiff in error.

H. M. Russell for defendant in error.

JOHNSON, PRESIDENT:

This was an action on the case brought in the circut court of Ohio county in September, 1883, to recover damages for causing surface-water to flow on the lot of plaintiffs, and also for damages to plaintiffs' trees from the use of coke-ovens near the said property and for injuring the health and destroying the comfort of the plaintiffs by said coke-ovens. The defendant demurred to the declaration and to each count thereof. The demurrer was overruled, and the defendant pleaded *not guilty*. On the 28th day of January, 1884, a verdict was rendered against defendant for $325.00, which verdict he moved to set aside. The court on the 10th day of July, 1884, overruled said motion, and on the 3d day of September, 1884, entered judgment on the verdict. The defendant saved certain alleged errors in the rulings of the court by a bill of exceptions, which certifies all the evidence given in the case and shows, that the defendant excepted to the admission and rejection of evidence, also to the giving and refusing of instructions, and to the refusal to set aside the verdict and grant him a new trial.

To the judgment the defendant obtained a writ of error.

The first error assigned is the overruling of the demurrer to the declaration. The plaintiff in error insists that he had the right to change the surface of his own land in the careful conduct of his own business, and it is insisted that there is no allegation in the second count of the declaration that the act of the defendant was "wrongfully, injuriously or negligently done." The second count contains these words: "Yet the said defendant, well knowing the premises, but contriving wrongfully and maliciously to injure the plaintiffs, afterwards, to-wit, on the first day of January, 1882, and on divers other days before and after that day made, prepared and dug such ditches, drains, troughs, dams and gutters

upon the land so occupied by him as aforesaid, and so dug, filled and altered the surface of the last named land that in times of rain-fall large quantities of the water which fell on the last named land were collected and diverted and caused to flow in and upon the said lot of the plaintiffs," &c. We think there is nothing in this objection and that the declaration and each count thereof is good. (*Gillison* v. *Charleston*, 16 W. Va. 282; *Knight* v. *Brown*, 25 W. Va. 808.)

It is assigned as error, that the court did not exclude from the jury the following statement of Mrs. Hargreaves: "All my ground washed away, and the fence fell down on the street and the front wall along with it, and I had to get all that wall rebuilt, and get all the ground filled up." The defendant by counsel moved to exclude what the witness said about the front wall. The court said, he would overrule the motion for the present; but if the testimony had no bearing upon anything mentioned in the declaration, it would thereafter be excluded, to which ruling the defendant by counsel excepted. The record does not show, that the counsel for defendant afterwards asked to have the evidence excluded. The first count of the declaration alleges, that by the acts of the defendant, "a certain wall, which the plaintiffs had built upon their said lot for the purpose of supporting one of the said dwellings, was undermined and caused to fall," &c. This was the first witness; and it did not appear, whether she was speaking of the same wall described in the declaration or not. What she said about it was drawn out on cross-examination; and before the counsel for defendant moved to exclude the evidence, it would have been an easy matter to have ascertained from the witness, whether the "front wall," which she had spoken of, was the same as that mentioned in the first count of the declaration. The counsel for plaintiff in error here insists, that it was afterwards made to appear, that the "front wall" spoken of by Mrs. Hargreaves was not the "wall" mentioned in the first count of the declaration, and that it was error for the court "not to redeem its promise" and exclude the evidence. The "promise" was a conditional one, "that if it shall appear that the wall" mentioned in the first count of the declaration is not the "front wall," of which the witness spoke, if asked to do so by counsel, the "court

will exclude the testimony." Counsel did not afterward ask the court to exclude the evidence, and so waived the objection, and the court did not err in refusing to exclude the evidence, when the objection was made to it. It would be unjust to the judge of the trial-court to hold, because he did not of his own motion exclude evidence shown to be irrelevant, which he had previously admitted, when it seemed at the time to be proper, that the judgment should be reversed and the verdict set aside.

It is also assigned as error, that the court refused to permit defendant to show, that the destruction of one panel of fence was with the consent of one of the plaintiffs. The court ruled, that the testimony of the witness in regard to the destruction of the fence is not a matter of controversy, and such evidence could not be considered by the jury. If this were an error, it was not to the injury of the defendant, and therefore he can not complain of it.

The instructions given and refused, are set out below as follows:

"The foregoing being all the evidence introduced to the jury, the plaintiff asked the court to give the jury each of the following instructions:

"INSTRUCTIONS.

"While the defendant, the run being on his land, had the right to deal with it as he saw fit, so that he did not cause the run, in its usual condition, to encroach upon the plaintiffs' property, yet he had no right, by any constructions or obstructions, to divert the run from its natural course so as to cause it, in its usual condition, to encroach upon the property of the plaintiffs, or to wash away their ground, and by the usual condition of the run is meant as well its condition at times of ordinary and usual floods and freshets as its condition in dry weather.

"In repairing, maintaining or replacing the bank of the run next his coke-ovens, the plaintiff has no right to change or narrow the natural course of the run so as to cause it to encroach upon the property of the plaintiffs, or to wash away their ground; and if the jury believe from the evidence that in maintaining, repairing or replacing said bank, he has so narrowed or changed the natural course of the said run, he is liable for any damages thereby occasioned.

"To the giving of each of the said instructions, the defendant, by his counsel, objected, but the court overruled said several objections, and gave each of the said instructions; to which several rulings of the court, the defendant by his counsel, then and there excepted."

The court, upon the motion of the defendant, gave the following instructions to the jury:

"INSTRUCTIONS.

"If the jury believe that the north side of plaintiffs' property was damaged by reason of an increase in the depth of the bed of the run, and that such increased depth was caused by the construction by the city of a sewer to carry the water of the run across Wetzel street, they are instructed that defendant is not liable for damages arising from such cause.

"The defendant has a right to maintain the bank of the run next his coke-ovens against washing, and to replace and restore it where it might have been injured by such washing, and defendant is not liable to plaintiffs for any damages which may have resulted to plaintiffs from such mainteance, replacement or restoration.

"If the jury believe that any of the plaintiffs deposited earth in the natural bed of the run so as to obstruct the course of the water therein, they are instructed that defendant had a right to remove such obstruction either by digging or causing the water to wash it away, and that for any damages resulting therefrom defendant is not liable.

"Even if the jury should believe from the evidence that smoke from defendant's coke-ovens sometimes reached the plaintiffs' property, yet the jury can not find for the plaintiffs on account of discomfort to them or damage to their trees unless the jury believe from the evidence that the smoke from defendant's ovens sensibly increased the discomfort or damage to plaintiffs arising from smoke caused by other manufacturing establishments in the city of Wheeling."

The defendant, by his counsel, moved the court to instruct the jury as follows:

"INSTRUCTION.

"The run being wholly on defendnat's ground he had a right to deal with it in any way he saw fit so that he did not cause the run in its usual condition to encroach upon the

plaintiffs' property. The defendant is not liable to plaintiffs for any washing, slipping or other injury to their property resulting from an extraordinary and unusual condition of the run."

To the giving of this last instruction, the plaintiffs, by their counsel, objected, and the court thereupon gave to the jury an instruction in the words of the first sentence of the instruction so prayed, but refused to give to the jury the latter part of the instruction prayed, being so much as is comprised in the second sentence thereof; to which ruling and refusal of the court the defendant by his counsel then and there excepted.

The record as to what counsel in his brief calls the "refused" instructions, is as follows taken from the bill of exceptions:

"The defendant, by his counsel, asked the court to give each of the following instructions:

"INSTRUCTIONS.

"The defendant had a right to occupy and improve his coal bank lot in such manner as he saw fit, using reasonable care in so doing, and is not liable because such improvements may have caused surface water to pass upon plaintiffs' adjacent land in greater quantities or in other directions than it was accustomed to flow.

" 'If the jury believe that the construction of defendant's wall and office in the place they were constructed, made it necessary for some of the water falling on defendants land to pass along the line between plaintiffs' property and defendant's coal bank property, and that one of the plaintiffs knowing this, agreed to such construction of defendant's wall and office, the jury are instructed that plaintiffs can not recover for any damages caused by the water so passing.'

" 'The jury are instructed that in determining the right of the plaintiffs to recover on account of discomfort to them or damage to their trees claimed to have been caused by smoke from defendant's coke-ovens, the jury are to consider the locality in which the plaintiffs property is situated, the kinds of trade and business carried on in the same city and neighborhood, and the exposure of plaintiffs' property to smoke caused by carrying on such trades.'

" 'Though the defendant, by the construction of buildings upon his ground, may have changed the course of surface water and made it to flow upon the property of plaintiffs, he is not liable for any damages caused thereby.'

"And the jury having brought in a verdict as in this record hereinbefore set forth, the defendant moved the court to set aside the said verdict and grant him a new trial, which motion was by the court refused; and to the ruling of the court refusing a new trial, the defendant, by his counsel, then and there excepted, and tendered this his bill of exceptions, praying that the same might be signed, sealed and made part of this record, which is now accordingly done."

The record does not show whether the last four instructions were given or refused. And even if it showed that they were refused, there was no exception to the refusal to give them; and therefore they can not be considered by this Court. (*Danks* v. *Rodeheaver*, *supra*, p. 274.)

A number of instructions were given on motion of defendant by counsel, to which the plaintiff did not except, and of course we will not examine them to see whether they propound the law correctly or not.

To each of the instructions given for plaintiffs the defendant by counsel excepted. We have carefully considered the instructions and decide that they propounded the law correctly. (*Gillison* v. *Charleston*, 16 W. Va. 282; *Knight* v. *Brown*, 25 W. Va. 808.)

The defendant by counsel asked the court to give the following instruction: "The run being wholly on defendant's ground, he had a right to deal with it in any way he saw fit, so that he did not cause the run in its usual condition to encroach upon the plaintiffs' property. The defendant is not liable to plaintiffs for any washing, slipping, or other injury to their property, resulting from an extraordinary and unusual condition of the run." To the giving of this the plaintiff by counsel objected, and the court gave to the jury the first sentence of the instruction, but refused to give the second sentence of the instruction, and the defendant, by counsel excepted.

It is claimed by counsel for plaintiffs that there was no evidence tending to show, that the damage was caused by any

extraordinary or unusual condition of the run; that it was either caused by the defendants having changed the run or by the ordinary action of the run. The counsel is mistaken as to there being no evidence tending to show that the damage might have been caused in part at least by the unusual condition of the run. The witness, Annie Wilson, said: "I saw Mr. Kimberly digging in the run that comes down the north side. He took the earth from the bottom of the run. I don't know what effect it had on the run or its course or direction. He was filling it up after a freshet, after the water had washed it down; that *throwed* the water on her side and washed away her part where the fence was standing." Witness James Young said: "I know the run pretty well. I don't think there had been any change in the course of that run in the time I had been living there. It may have varied a little this way at the south side. It has washed in on that side a good little bit; the cause of that was the run—the water, coming down off the hill, washing it out all the time. Every rain some of it washed out. Some times there is a big amount of water comes down there. I have seen it blockade the whole road, and wash people out below. There have been several large wash-outs since I have been living there."

The court had at the instance of counsel for plaintiffs instructed the jury, that "the defendant had no right by any constructions or obstructions to divert the run from its natural course, so as to cause it in its *usual* condition to encroach upon the property of plaintiffs." It was right enough therefore to give the instruction at the instance of defendant, that "The run being wholly on the defendant's ground, he had a right to deal with it in any way he saw fit, so that he did not cause the run in its usual condition to encroach upon the plaintiffs' property." And it would have been right for the court to have given the residue of the instruction: "The defendant is not liable to plaintiffs for any washing, slipping or other injury to their property resulting from an extraordinary and unusual condition of the run," if there had been added thereto the necessary modification, "unless such damage to the plaintiffs' property was rendered greater, by the acts of the defendant." It might be that the putting of obstructions in the run would cause the run—in its extraordinary and un-

usual condition to do much more damage to plaintiffs' property than at such times it would have done but for such obstructions. The court did not err in refusing to give the second sentence of said instructions as asked.

It is also assigned as error, that the court permitted the witness, Butterfield, to give his *opinion* as to the *amount* of damage the plaintiffs had suffered by the acts of the defendant; and *Yost* v. *Conroy*, 92 Ind. is cited. It is there held, that the opinion of a witness as to the damage a ditch would cause to the lands of a party is not proper evidence. Elliot, judge, delivering the opinion of the court, says: "Opinions of witnesses as to the amount of benefit or damage sustained by a party are not competent." He cites a line of Indiana decisions to sustain him, and further says: "It may well be held, that these cases declare the general rule correctly, since to hold otherwise would be to put the witnesses in the place of the jurors, and commit to them the amount of the recovery. A contrary doctrine would also violate the rule, that witnesses can not express an opinion upon the precise point, which the issues present for the decision of the jury." But the learned court did hold in that case, that "the opinion of one acquainted with the property as to its value with and without the ditch is proper evidence." Now it seems to me, that it is a very nice distinction. If the witness testifies, that the property is worth $1,000.00 without the ditch and $800.00 with the ditch, has he not given his opinion, that the land was damaged just $200.00? Why may the enquiry not at once be made: "How much is the land injured by the ditch?" If he answers $200.00, then can not all his reasons for his opinion be elicited on cross-examination? In *Snow* v. *Boston and Maine R. R.*, 65 Me. 230, it is held, that when the value of real estate taken for a railroad, or the amount of damage caused by such taking is in question, persons acquainted with it may state their opinions as to its value, or as to the amount of damage done, if all is not taken. In *Vandine* v. *Burpee*, 13 Metc. 288, a case much like this, it appeared, that on the trial of an action to recover damages for injury done to the plaintiff's garden and nursery by the smoke, heat and gas proceeding from the defendant's brick kiln, after two gardeners, who had much experience in rais-

ing and cultivating fruit trees, shrubs and plants, had testified to the particulars of the plaintiff's injury, they were asked by the plaintiff: "What was the amount of damage," caused by the injury, to which they had before testified; and it was held that these witnesses might give their opinion as to the amount of such damage.

Dewey, judge, said: "It seems to us that it would be impracticable to dispense with this species of testimony in many actions of *trover* for personal property, where no detail of facts could adequately inform the jury of the value of the articles. The opinion of a witness as to the value of a horse is much more satisfactory evidence than a detailed statement of his size, color, age, &c.. to give the jury the requisite information to enable them to assess damages for the conversion of such a horse."

In *Railroad* v. *Foreman*, 24 W. Va. 662, it was held, that such evidence was admissable. The Court in that case said, by Green, judge: "There is no objection to taking the opinion of witnesses as to either the amount of damages or as to the amount of the benefit. It is the usual practice in this State and Virginia." He cites a number of pertinent authorities to sustain the position.

But the court did err, in permitting the witness against the objection of the defendant's counsel to answer the following question: "State if you can what will be the probable damage that will occur in the future from what has already been done to the run in the way of digging, or changing its course?" The witness answered, defendant excepting to question and answer: "Well it is pretty hard for me to answer the question as to the amount of damage, but I think it will be considerable, provided the water course is left in the same condition it is, because it is washing out naturally right against the bank; and if it had been left full up level to the road where the water used to go, of course the bank would have held up. This has took half the lot away; but the prospect is there will be a great deal of slips there with the run." Why this evidence was offered I do not understand. The counsel for the defendant in error in his brief says: The plaintiffs were unquestionably entitled to recover in this action the damages which were likely to occur in the

future as well as those which had already occurred in the past." He cites no authority, neither does he present any argument. It seems to me that both reason and authority are against his position. In *Smith* v. *R. R.*, 23 W. Va. 453, Green J. said: "Where the damage is of a permanent character and affects the value of the estate, a recovery may be had at law of the entire damages in one action; but where the extent of the wrong may be apportioned from time to time, separate actions should be brought to recover the damages sustained. He cites *Troy* v. *Cheshire R. R. Co.*, 23 N. H. 101; *Cheshire Turnpike Co.* v. *Stevens*, 13 N. H. 28; *Parks* v. *The City of Boston*, 15 Pick. 198; *Blunt* v. *McCormick*, 3 Dinio 283; *Thayer* v. *Brooks*, 17 Ohio 489; 4 Dallas 147; *Tucker* v. *Newman*, 11 Ad. & El. 40.

In *Thayer* v. *Brooks*, 17 Ohio 489, *supra*, the action was case for nuisance in diverting the water from the mill of the defendant in error, and the court held that the rule of damages in an action for nuisance is the injury actually sustained at the commencement of the suit.

In *Blunt* v. *McCormick*, *supra*, the court said: "The rule of damages laid down by the court was erroneous. In this action the plaintiff could only recover for injuries actually sustained before suit was brought, and not for supposed prospective damages. Supposing the lease to contain a covenant not to obstruct the light, and the action to have been brought on such covenant, the rule of damages would be otherwise, for the covenant being a single cause of action, one recovery on it would be an absolute bar to any future action. But a recovery in an action on the case, for obstructing the light prior to the time when the action was commenced would not bar a future suit for the continuance of the same injury."

In *Cheshire Turnpike* v. *Stevens*, 13 N. H., *supra*, it was held, that where an action on the case was brought to recover damages for laying out a highway around a turnpike gate, so as to divert the travel from the turnpike, and damages wererecovered for the loss of toll occasioned by the opening of the highway to the date of the plaintiff's suit, subsequent suits might be maintained for further damage accruing from time to time, as long as the

highway was kept open. A recovery had been had before for dividing the tolls, and it was insisted that no action could be maintained for continuance of the road after recovery had been once had for the opening of the way. But Upham, J. for the court, said: "This is erroneous. The cause of action remains so long as the cause of the injury is upheld by the defendant. It has been in the defendant's power at any time to discontinue the grievance complained of, and so long as this power remains it would be unjust to visit him with damages except during the actual time the damage has been sustained. The injury is not necessarily permanent in its character, and recovery therefor can only be had for the past, as it may cease at any moment. The injury is of the same character as that arising from a nuisance, and is subject to the same rule of law."

It seems to me that in all those cases, where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed, that the defendant would remove it, rather than suffer at once the entire damage, which it might inflict, if permanent, then the entire damage can not be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues. Here the cause may be removed, and it is supposed will be by the defendant, rather than submit to having the entire damages recovered against him, for a permanent injury, or to suffer repeated recoveries as long as the cause of the injury continues. The court erred in admitting this evidence and, for this reason the judgment will have to be reversed.

It is also assigned as error, that on cross-examination of Mrs. Hargreaves an objection was sustained to the question: "Don't your waste water run to Mr. Kimberly's ground?" The court sustained the objection to this question, and the defendant excepted. It was perfectly proper to show under the plea of not guilty in mitigation of damages, that the damages alleged by the plaintiff are caused in part by his

wrongful act; but one trespass can not be set off in bar of another. (*Knight* v. *Brown*, 25 W. Va. 808.) And if the defendant had been prejudiced by this ruling, it would be sufficient for the reversal of the judgment. But while the ruling of the court was error, I do not think it was to the prejudice of the defendant, as immediately afterwards the witness did substantially answer the rejected question.

As the judgment must be reversed, it would be improper to enquire, whether the verdict was justified by the evidence.

The judgment of the circuit court of Ohio county, is reversed, the verdict of the jury set aside, and the case remanded for a new trial.

REVERSED. REMANDED.

CHARLESTON.

WHITE v. C. & O. RAILWAY COMPANY.

26 800
f57 81

Submitted September 14, 1885.—Decided November 28, 1885.

26 800
65 209

An order is entered by the circuit court sustaining the defendant's demurrer to the plaintiff's declaration and each count thereof, which concludes as follows: "And thereupon this action is remanded to rules with leave to plaintiff to amend his declaration," and from this order the plaintiff obtains a writ of error to this Court; HELD:

I. This Court will presume, the record not showing affirmatively the contrary, that the case was remanded to rules at the instance of the plaintiff.

II. Such order is not a final judgment from which a writ of error will lie to this Court.

A statement of the case will be found in the opinion.

E. W. Wilson for plaintiff in error.

J. H. Ferguson for defendant in error.

SNYDER, JUDGE:

Writ of error to a judgment of the circuit court of Kanawha county in an action of trespass on the case brought by the plaintiff in error, C. E. White, against the Chesapeake & Ohio Railway Company to recover damages for unlawfully expelling him from the train of the defendant. The declaration contains two counts. On December 4, 1879, the court overruled the defendant's demurrer to the declaration and continued the case. The last order in the case, the one to which this writ of error was allowed, was entered April 9, 1883, and is as follows.

"This day came again the parties to this action, by their attorneys, and thereupon on motion of defendant, after objection by plaintiff, the plaintiff is required to withdraw his joinder to the plea heretofore entered by the defendant herein, and the same having been done, the defendant likewise, after objection by the plaintiff, withdraws its plea of not guilty entered herein; and thereupon with the leave of the court, and also after objection by the plaintiff, the demurrer to the plaintiff's declaration, and each count thereof, heretofore entered herein, was again argued by counsel for the respective parties; and the matters arising thereon having been considered, the court is of opinion to and doth accordingly sustain the said demurrer to the declaration and each count thereof; to which plaintiff excepts and objects. And thereupon this action is remanded to rules with leave to the plaintiff to amend his declaration."

It is contended by the defendant in error that no final judgment has been rendered; that so far as the record discloses the case is still pending at rules, and therefore this writ of error should be dismissed as having been prematurely and improvidently awarded.

On the face of the order it does not appear that the action was remanded to rules upon *the motion* of the plaintiff. It is certain that the plaintiff can not be compelled to amend his declaration. Whether or not he will do so, is necessarily at his option. Even after leave has been granted to do so on his motion he may decline to amend either because his case can not be improved, or because, upon more mature consideration, he is satisfied no amendment is necessary. In such

case it would be folly for the court unasked to compel the plaintiff to go to rules to amend or to require him to amend after he had gone to rules on his own motion. The plaintiff is presumed to know his cause of action and what facts constitute it. Where he has made all the averments he deems necessary or all he can sustain by proof, of which he alone must be the judge, it is not for the court unasked to send the action to rules, and it would be irregular and improper for it to do so. In a proper case the court upon sustaining a demurrer to a declaration or bill should, *when asked to do so*, grant leave to amend, but it can not remand the case to rules or order an amendment against the will of the plaintiff. Therefore, while the order in this case might give some countenance to the suggestion that the court did of its own motion send the action to rules, still as we can not presume that the court committed an error or acted improperly, we must infer that the order, sending the case to rules for the plaintiff to amend his declaration, was made at the instance of the plaintiff. This view is strengthened by the fact that the plaintiff objected to every direction given in said order except the one remanding the case to rules.

The statute providing for writs of error declares that "In civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than $100.00, wherein there is *a final judgment*, a writ of error will lie." Sec. 1, chap. 157, Acts 1882, p. 505.

There are certain specified exceptions to this general rule mentioned in the statute, but none of them have any application to the case before us.

It is certain that there is no final judgment in this case. In order to be such there should have been a judgment for the defendant on its demurrer to the declaration. That would have ended the action with costs against the plaintiff in the circuit court, and entitled him to a writ of error to this court. The plaintiff instead of bringing the case to this Court should, if he did not desire to amend his declaration, have informed the court of that fact and permitted a judgment for costs in favor of the defendant to be entered against him. We cannot presume the court would have refused to enter such judgment if informed that the plaintiff did

not wish to amend. If the court should have done so against the protest of the plaintiff, and that fact appeared affirmatively in the record, a different question from that here decided would have been presented. I am therefore of the opinion that the writ of error in this case must be dismissed as having been prematurely and improvidently awarded.

Having thus determined that this writ of error should be dismissed, it might seem unnecessary to refer to the merits of the case because it may come back here upon the same record, and any opinion now given would not then be obligatory, and would readily be departed from, if upon further consideration we should be dissatisfied with it. But as I have carefully considered the merits, and as an expression of opinion thereon may be some guide to the parties and perhaps save future litigation between them, I have concluded to state the result of my investigation of the merits and some of the reasons therefor, especially as the other judges think there is no impropriety in my doing so. There are many precedents for pursuing this course among which are the following cases: *Wells* v. *Jackson*, 3 Munf. 458; *Goldsby* v. *Strother*, 21 Grat. 107; *Steenrod* v. *Railroad Co.*, 25 W. Va. 133–38.

The only question on the merits is whether or not the court erred in sustaining the demurrer to the declaration. The first count avers, in substance, that the defendant was a common carrier of passengers and freight for hire; that on August 9, 1879, at the request of the defendant, the plaintiff became a passenger in one of its carriages to be carried from Charleston to Paint Creek; that after the defendant had received the plaintiff as such passenger and after the train had departed from Charleston the defendant caused the train to be stopped "and then and there wilfully, wantonly, insultingly, oppressively, unjustly and unlawfully demanded and required the plaintiff to quit said carriage in which he had become a passenger as aforesaid, and expelled him, the plaintiff, therefrom."

The substance of the second count is, that the defendant, being a common carrier as set out in the first count, had a depot and ticket office at Charleston; that the price of a ticket for a passenger between Charleston and Paint Creek was fifty-five cents; that the plaintiff desiring to travel from

Charleston to Paint Creek on the defendant's train went to its ticket office at Charleston a reasonable time before the departure of the train to purchase a ticket and had the money to pay for the same, but by the neglect of the defendant its ticket agent was absent and no person could be found to sell him such ticket; that he informed the conductor of the train of his inability, on account of the absence of the ticket agent, to purchase a ticket, and was thereupon, immediately before the departure of the train from said depot, told by the conductor to get upon the train and he did so; that after the plaintiff had thus become a passenger upon the defendant's train he then and there tendered to said conductor, and was ready and willing at any and all times while on the train to pay the said sum of fifty-five cents, the price of a ticket from Charleston to Paint Creek, together with an additional charge of ten cents, to be carried on said railway from Charleston to Paint Creek, but the said conductor after the departure of the train from Charleston demanded of the plaintiff $1.00 as the fare for carrying him from Charleston to Paint Creek on said train, which sum the plaintiff refused to pay, whereupon the said conductor caused the train to be stopped at a distance of three miles from any depot, station or stopping place on its railway, " and then and there wilfully, wantonly, insultingly, oppressively, unjustly and unlawfully demanded and required of the plaintiff to quit said train on which he had become a passenger as aforesaid and expelled him, the plaintiff, therefrom;" wherefore he says he is injured and damaged $5,000.00, &c.

It seems to me that both of these counts are good and that either of them sufficiently sets forth a cause of action. Our statute declares that, "No action shall abate for the want of form, when the declaration sets forth sufficient substance for the court to proceed upon the merits of the case." Sec. 9, ch. 125, Code, p. 600. And in sec. 29 of the same chapter it is declared that, "On demurrer the court shall not regard any defect or imperfection in the declaration * * * unless there be omitted something so essential to the action * * * that judgment according to law and the very right of the cause can not be given."

In *Hawker* v. *B. & O. R. R. Co.*, 15 W. Va. 628, this Court

held that, "A declaration against a railroad company for negligently and wrongfully killing the plaintiff's cattle on its track, need not state the acts of omission or commission which constituted the negligence and wrong." These are matters of proof and need not be specified in the declaration. *Blaine* v. *C. & O. R. R. Co.*, 9 W. Va. 252; *Baylor* v. *B. & O. R. R. Co.*, *Id.* 270.

It is unquestionable law, that the conductor of a railroad train represents the corporation in the control of the locomotive and cars, the regulation of the conduct of the passengers as well as the subordinate servants of the company, and the collection of fares. He may even eject from his train a passenger for any proper cause. *O'Brien* v. *Boston, &c., R. R. Co.*, 15 Gray 20.

It is also well settled that a corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as for their acts of negligence; and the corporation is thus liable although the particular acts were not previously authorized, nor subsequently ratified by the corporation. *Ramsden* v. *Boston, &c., R. R. Co.*, 104 Mass. 117; *P. & R. R. R. Co.* v. *Derby*, 14 How. 468; *Jeffersonville R. R. Co.* v. *Rogers*, 38 Ind. 116.

In *Tarbell* v. *C. P. R. R. Co.*, 34 Cal. 616, the declaration was substantially the same as the second count in this case and a demurrer to it was overruled. In that case the court decided that, "In actions for breach of duty by a railroad company in not carrying a passenger it is not necessary for the plaintiff to allege in his complaint a strict legal tender. It is sufficient to allege that the plaintiff was ready and willing and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts." It was also held in that case, "A railroad company is not justified in refusing to carry a passenger already admitted into its cars and the journey commenced, who, upon demand of his fare, tenders only legal tender notes in payment. In such case the contract is already made and in process of performance and the kind of money to be paid is no longer an open question."

It is the duty of a railroad company, or other common-

carrier, to receive all persons as passengers who offer to become such. This duty results from their setting themselves up for a public and common employment for hire and a breach of it is a breach of the law for which an action lies. This obligation is, however, subject to the qualifications, that the regular fare be tendered or an offer made to pay it, that the applicant is not an unfit person to be received and there is room for him. It is also subject to the further qualification that the railroad company may prescribe all reasonable regulations in respect to the admission of persons into their trains, depots, &c., and enforce compliance therewith in a proper manner. Ang. on Car., secs. 525, 530.

While it is essential that the declaration should aver, that the plaintiff was willing and ready to pay the defendant the amount the defendant was legally entitled to charge for the carriage of the plaintiff and his baggage, it is not necessary that he should make an absolute tender. It is sufficient if the plaintiff is ready to pay when the defendant undertakes the duty, the payment of the fare and the receipt of the passenger are contemporaneous acts and there is no positive duty to pay on the part of the plaintiff until there is a consent to receive him as a passenger. Ang. on Car., secs. 418, 590; *Pickford* v. *Grand Junction R'y. Co.*, 8 M. & W. 372; *Rawson* v. *Johnson*, 1 East 203; 4 Rob. Pr. 778.

The record does not disclose the grounds on which the demurrer to the plaintiff's declaration in this case was sustained and as we have been furnished with no argument or brief by the defendant in error on that subject, we are left entirely to conjecture as to the grounds upon which the circuit court acted. While the declaration seems to me plainly sufficient, I have thought it proper, in the absence of any specific objection to it, to state some of the general principles of law applicable to actions of this nature.

The first count avers not only a breach of duty on the part of the defendant as a common carrier of passengers but it avers a breach of contract on its part. The averments are that the plaintiff at the request of the defendant had become a passenger on its train and that after he had been received as such passenger and had been carried a part of his journey, the defendant stopped the train three miles from any

stopping place or station and then and there wantonly and unlawfully required him to quit the train and expelled him therefrom.

If there was any legal cause for ejecting the plaintiff from the train after he had been accepted as a passenger, that is a matter of defence which it was unnecessary to refer to or specifically negative in the declaration. The acceptance of the plaintiff as a passenger was an admission by the defendant that it had room for him, that he was a proper person to be received and that he had complied with its reasonable regulations including his obligation to pay the proper fare. If after being so accepted he failed to pay his fare or became obnoxious for any other cause, this was a matter of defence. The general averment of the declaration that he was wantonly and unlawfully expelled from the train was sufficient to make a *prima facie* cause of action and put the burden of showing that the plaintiff was properly ejected on the defendant.

The second count, according to the general rules and principles of law before stated, is so plainly sufficient that any further comment on it is unnecessary.

DISMISSED.

CHARLESTON.

COX, EXECUTOR *v.* WAYT *et als.*

26 807
45 452

26 807
51 191

26 807
f63 595

Submitted September 8, 1884.—Decided November 28, 1885.

1. If a deed of trust, the execution of which has not been proved or acknowledged in the manner prescribed by law, be admitted to record by the clerk of the county court of the proper county, such deed is not "duly admitted to record." (p. 816.)

2. If such a deed so admitted to record, be copied by such clerk into the deed-book, it is not, by being so copied into such book, "duly admitted to record." (p. 816.)

3. Such deed so admitted to record and copied into the deed book, is void as to subsequent purchasers for valuable consideration without notice. (p. 818.)

4. Such deed so improperly admitted to record and copied into such deed book is not a recorded deed, and the same is not notice to subsequent purchasers. (p. 816.)

5. Where the execution of a deed or other writing is acknowledged by the grantor, or proved before the clerk of a county court, it is the duty of such clerk to certify such acknowledgement or proof upon the said deed, or in some writing thereto annexed, and when the same is admitted to record, to record the same with the deed in the same manner as acknowledgments before other officers are required to be recorded. (p. 815.)

6. "W." conveyed land to C. in trust to secure to "B." $4,600.00, which deed was never recorded; three years afterwards "W." conveyed the same land in trust to "P." to secure, first, to Susan E. a debt of $950.00 and second, to secure ratably to "G. E." and "F. M. W." and other creditors of "W." certain specified debts, which last deed was on the date thereof, duly recorded. Of the creditors of "W." whose debt, were secured by the deed to "P." "Susan E.," "G. E.," and "F. M. W." alone, had notice of the un-recorded deed to "C." The land having been sold in a suit between these trust-creditiors, and the proceeds of the sale proving insufficient to satisfy all of the trust debts; HELD:

I. That the deed to "C." was void, as to all the creditors secured in the deed to "P." except "Susan E.," "G. E." and "F. M. W." who had notice thereof.

II. That all the creditors of "W." whose debts were secured in the deed to "P." except "Susan E.," "G. E." and "F. M. W.," were subsequent purchasers for valuable consideration without notice, and that they were entitled to have their debts paid in full, before "B." was entitled to receive any part of the proceeds of such sale.

III. That "Susan E." was entitled to charge the land with the amount of her debt, subject only to so much of the $4,600.00 as remained unpaid at the time of the sale.

IV. That until "Susan E." "G. E." and "F. M. W." shall be fully paid the amounts of their several debts, "B" is only entitled out of such proceeds to receive so much of the unpaid balance of the debt of $4,600.00 as may remain after deducting therefrom, the several amounts due to the creditors secured in the deed to "P." who had no notice of the un-recorded deed to "C."

V. That when "B." shall have received that amount out of the proceeds, the residue thereof must be applied, *First*, to pay to "Susan E." the full amount of her debt; *secondly*, to pay ratably to "G. E. and "F. M. W.," the full amount of their

several debts, and the residue, if any, upon the trust debt of "B." of $4,600.00.

7. If a lien-creditor, standing in the position of a subsequent purchaser for valuable consideration without notice, transfers his debt to an assignee, who had notice of a prior un-recorded deed such assignee will hold such debt from such un-recorded deed in the same manner, as his assignor was entitled to hold the same. (p. 820.)

Woods, Judge, furnishes the following statement of the case:

James Wayt by deed dated the 2d day of August, 1875, conveyed to John Cox a tract of 175 acres of land in Ohio county, in this State, to secure to Jane Brown and Ann Brown the sum of $4,600.00 payable on the 1st day of August, 1878, with interest payable annually. This deed, on the 7th day of August, 1875, was delivered to and recorded by the clerk of the county court of said county, but the execution thereof, was never acknowledged or proved in any of the modes prescribed by law, nor was it contended that it had in fact been so acknowledged or proved. On the 26th day of May 1879 said James Wayt by deed of that date conveyed the same land to Daniel Peck in trust to secure, first, $950.00 with interest to Susan Edgington; and second, to secure ratably, to George Edgington and Francis M. Wayt, and the other creditors therein named the amounts therein alleged to be due to them respectively. This deed on the day of its date was duly acknowledged and recorded in the clerk's office of the county court of said county. Before the last mentioned deed of trust was executed, said Susan Edgington, George Edgington and Francis M. Wayt, had actual knowledge of the existence of the deed of trust executed to Cox, trustee, to secure the debt of $4,600.00 to Jane and Ann Brown, but none of the other creditors of Wayt secured in the deed to Peck, had knowledge of the deed to Cox. Ann Brown having died, Cox became the executor of her will, and James Wayt afterwards on the 17th day of November, 1879, confessed in the clerk's office of the said county court, a judgment, in favor of Cox executor of Jane Brown, and of Ann Brown, for the sum of $5,508.50 with interest from that date, being the amount then due on

the trust debt of $4,600.00, and $4.60 costs, of which, an abstract was on the same day recorded on the judgment-lien docket of said county. Other creditors of James Wayt subsequently recovered judgment against him. Jane Brown also died and Cox became the executor of her will, who soon thereafter in his character of executor of Ann Brown, and of Jane Brown filed his bill in the circuit court of Ohio county, against James Wayt, Susan Edgington, George Edgington, Francis M. Wayt, Daniel Peck and the other creditors mentioned in the deed of trust executed to him on May 26, 1879, and against all other judgment-creditors of James Wayt, to enforce the lien of the judgment recorded by him and Jane Brown, against said 175 acres of land; and also the lien created by his deed of trust dated the 2nd of August, 1875, claiming, that the same was a prior lien, as against all the creditors secured by the deed of trust to Peck, and especially as against Susan Edgington, Geo. Edgington and F. M. Wayt who he alleged had actual notice of his trust deed before and at the time of the execution of the deed of trust to Peck; and also, that his deed of trust, although the execution thereof had neither been acknowledged or proved in any of the modes prescribed by law, having been in fact recorded in the proper county by the proper officer, was constructive notice to all subsequent creditors of James Wayt of its existence and prayed that the lien of his deed of trust might be given precedence over all the creditors mentioned in Peck's deed of trust, or if not over all, at least over Susan and George Edgington and F. M. Wayt, and that the lien created by the judgment of $5,508.50 may be enforced, and for general relief. All of the defendants mentioned in Peck's deed of trust answered the bill and set up their respective debts, and all of them except F. M. Wayt, George Edgington and James H. Wayt denied that at the time of the execution of the deed to Peck, they had knowledge of the deed to Cox. On the 23d day of December, 1882, the cause was heard upon the bill, exhibits, the answers of the defendants, general replications thereto, and the court entered a decree referring the cause to a commissioner for the following purposes:

"First. To take and state the account between the plaintiff and the said James Wayt of all liens.

"Second. To report which of the alleged creditors mentioned in the said deed of trust made by the said James Wayt to the said Daniel Peck, dated May 26, 1879, had (personal) knowledge of, and are bound by, the said deed of trust, made by the said James Wayt to the said J. H. Cox, dated the August 2, 1875.

"Third. To find and report what may be due from the said James Wayt to all his other *lien*-creditors, the said Cox mentioned in this suit, and the priority, if any, over the other *lien*-creditors.

"Fourth. Any other pertinent matter required of him by any of the parties."

The report of the commissioner showed the several lien-debts due from the James Wayt to the plaintiff and defendants respectively fixed their several priorities as follows: first, all the debts secured by the deed of trust to Peck except the debt due to Susan Edgington of $950.00 with interest on $450.00 from the 1st day of November, 1877, and interest $500.00 from the 1st day of November, 1878; and the debt to George Edgington of $100.00 with interest from November 12, 1877, and the debt to Francis M. Wayt of $500.00 with interest from the 14th day of May, 1879 until paid, were liens of equal dignity created by the deed of trust to Daniel Peck. Second, two judgments, one in favor of John L. Terrell, administrator of Samuel McClure for $56.50 with interest from the 17th of June, 1877 and $16.95 costs, and one in favor of I. H. Vanmeter for $289.99 with interest from the 18th of June, 1879, and $12.25 costs, being of equal dignity they constitute the next lien on said land.

Third.—The judgment of the plaintiff for $5,508.50 with interest and costs, constitutes the next lien thereon, as of the date of November 17, 1879, and

Fourth.—The judgment of Robert B. Wayt for $2,889.52 with interest from November 24, 1879 and fifty-eight cents costs, constitutes the last lien thereon.

The commissioner further reported that Susan Edgington, George Edgington and Frances M. Wayt, had personal knowledge of, and were bound by the deed of trust made by James Wayt to said Cox trustee and that the last named deed of trust takes precedence over the

created by the deed of trust to Peck in favor of Susan and George Edgington and Francis M. Wayt, for the amount of their several debts. Various exceptions to the commissioners report were filed by the plaintiff and the creditors, mentioned in the deed to Peck. The cause was again heard on June 2, 1883, when the court overruled the exceptions, confirmed the commissioners report, and declared the liens upon the land, for the same amounts and in the same order of priority, as reported by the commissioner, and declared that "as to Susan Edgington's lien she should not be postponed to a greater amount than $4,600.00 with interest from August 3, 1876, until paid, so that after that amount shall have been paid on the liens, she shall take her place of first lienor; and that as to the liens of George Edgington and Francis M. Wayt, they shall not be postponed to a greater amount than $4,600.00, with interest from August 2, 1876, and $950.00 and interest on $450.00 parcel thereof of from November 1, 1877, and on $500.00, residue thereof from November 1, 1878, so that after the aggregate of these amounts shall have been paid on the liens, they shall then take their proper places as second lienors;" and then decreed the land to be sold by commissioners appointed for the purpose, to satisfy these liens unless otherwise paid within thirty days thereafter. On November 24, 1883, the land was sold for $8,750.00, and a report thereof returned, and on December 10, 1883, the court entered a decree confirming the sale, providing for the collection of the purchase-money, the payment of the costs of suit and expenses of sale, and directing said commissioners out of the residue of the proceeds of sale:

Fourthly.—To pay ratably to each of the creditors mentioned in deed of trust to Peck, excepting only Susan Edgington, George Edgington and Francis M. Wayt, the several amounts ascertained to be due to them respectively, by the decree of June 2, 1883.

Fifth.—After making the aforesaid payments, to pay ratably the two small judgments recovered by John L. Terrill, administrator of McClure, and by said Vanmeter respectively.

Sixth.—After making said payments, they shall pay to the

plaintiff Cox, executor, as aforesaid such an amount as when added to the aggregate of the payments hereinbefore directed, fourthly and fifthly to be made, to-wit: the payments to Whitham, Perrine, Schambra & Sons, Rogers, James H. Wayt and Vanmeter, as will equal the sum of $4,600.00 with interest thereon from August 2, 1876, until such payments shall be made; and such payments when made shall be a credit to that extent on the lien ascertained in the plaintiff's favor by the decree entered herein on June 2, 1883.

Seventh.—After making the foregoing payments they shall pay to Susan Edington $950.00 as hereinbefore stated.

Eighth.—After making all the foregoing payments they shall pay ratably to Francis M. Wayt $500.00, and to George Edgington $100.00, with interest on each of said sums as before stated.

Ninth.—After making the foregoing payments they shall pay to the plaintiff Cox, executor, &c., the sum of $5,513.10 with interest on $5,508.50 from November 17, 1876, until paid, less the amount which shall have been paid thereon, as hereinbefore sixthly provided.

Tenth.—After making all the foregoing payments they shall pay to Robert B. Wayt $2,890.37 with interest on $2,889.52 from November 24, 1879, until paid.

On September 7, 1883, the plaintiff having obtained leave to do so filed his bill of review asking that the decree entered herein on June 2, 1883, might in certain particulars be reformed. The defendants demurred to the bill of review, and the court sustained the demurrer and dismissed the bill with costs.

From the said decrees of June 2, 1883, and of December 10, 1883, the plaintiffs obtained an appeal.

R. White for appellant.

Daniel Peck and *J. F. Jones* for appellee.

WOODS, JUDGE:

Six errors in these proceedings have been assigned by the appellant. The first and second raise the question, whether the plaintiff's deed of trust dated August 2, 1875, was to be held as a recorded deed; the third and fourth, whetr the

defendant James H. Wayt as the assignee of certain debts secured by the deed to Peck, trustee, was entitled as to these debts, to preference over the debt of $4,600.00, secured by the deed of trust to Cox; the fifth, whether the court erred in sustaining the demurrer to the bill of review; and the sixth, whether the court erred to the prejudice of the appellant, in the distribution of the proceeds of the sale of the 175 acres of land mentioned in the deeds of trust. It is contended by the appellants' counsel that although the deed of trust executed by James Wayt to Cox, trustee, does not appear by any endorsement made thereon, or attached thereto, or recorded therewith, to have been acknowledged before the clerk of the county court of Ohio county, or before any other person authorized to take the acknowledgment thereof, or that the execution thereof had been proved before the said clerk, yet the fact that the same was admitted to record by him, and was copied into the deed-book, where deeds may properly be recorded, it must be presumed that it was in fact acknowledged, or the execution thereof proved in the manner prescribed by law; and that the deed of Cox, so admitted to record must be held as a recorded deed.

The appellant's counsel has furnished an ingenious argument in support of this novel proposition, drawn principally from a critical examination of the phraseology of ch. 73 of the Code, as amended by ch. 67 of the Acts of 1875. The second section thereof authorizes the clerk of the county court of any county wherein any deed, &c., is to be, or may be recorded, to admit the same to record in his office, as to any person whose name is signed thereto when it shall have been acknowledged by him, or proved by two witnesses as to him, before such clerk of the county court.

By the third, fourth and fifth sections of the Code so amended such deed may also be admitted to record upon a certificate of such acknowledgment before a justice, notary public, &c., written on or annexed to the same, and the deed of a married woman, upon the certificate of her privy examination and acknowledgment, or annexed to such deed, and the counsel concludes, that because the second section authorizes the clerk to take the acknowledgment of deeds, or to receive proof of the execution thereof, does not in terms

require him to make out a certificate of acknowledgment or proof before him, and endorse the same on, or annex it to the deed or other writing; that no such thing is necessary to be done by him. In other words, that while he is only authorized to admit the deed to record after it has been certified on the deed, by some one authorized to do so, that the deed has been acknowledged, or when the same is so acknowledged, or the execution thereof proved before him, by two witnesses, yet he is at perfect liberty to disregard this requirement of law, and admit to record any deed or other writing produced to him, without acknowledgment or proof; and then point to his unlawful act, as conclusive evidence that the law has been complied with. Such a construction would operate as a complete abrogation of this requirement of the statute.

While these provisions of the statute have substantially been in force in Virginia for more than a hundred years, the counsel has not been able to present a single case wherein his views have been sustained, or where such a construction has ever been contended for.

"The exercise of the probate jurisdiction in regard to deeds consists of two parts, one of which is the taking officially the proof or acknowledgment of the instrument; and the other is its recordation, or what is the same thing in effect, the receiving it officially for that purpose, and the two together when duly performed by the proper authorities constitutes a complete act of registration." *Carper* v. *McDowell*, 5 Grat. 233. These two parts, constituting the complete act of registration must both be performed, and the accidental fact that they may some times be performed by the same officer, will not authorize him to dispense with the performance of the first, and substitute the last, as conclusive evidence, that the writing has been acknowledged, or the execution thereof proved before him. If the construction contended for be sound, then every deed, however defective or imperfect the certificate of acknowledgment may be, whether the party making such certificate had authority to make it or not, would, as soon as admitted to record, of necessity become a recorded writing, for *non constat*, but that when the same was delivered to the clerk, it was acknowledged or proved before him.

The registration of a deed is a matter of record, and this record is composed of the instrument itself, with the endorsements showing its proof or acknowledgment, and its admission to record; all of which are copied into the deed-book, and a transcript therefrom, or from the originals, is, as well as the originals, evidence for and against all persons. 5 Grat. *supra*; Code, ch. 130, sec. 5. Sec. 6 of ch. 73 of the Code, as amended by ch. 67 of Acts 1875, declares that "every writing so admitted to record shall, with all certificates of privy examination or acknowledgment, and all plats, schedules and other papers thereto annexed or endorsed thereon be recorded by or under the direction of the clerk of the county court in a well bound book, to be carefully preserved." As a deed when properly admitted to record, becomes in itself a record, which is evidence against any person of the due execution thereof, and stands as notice to all persons of the contents thereof, it follows, that if in this case, as in all others, it appears on the face thereof, that the court or officer making the same, had no jurisdiction over the subject or authority to make the same, it can as a record, have no force or effect whatever. *Maxwell* v. *Light*, 1 Call. 117; *Taverner* v. *Barrett*, 21 W. Va. 656. Therefore, the deed of trust to Cox, dated August 2, 1875, admitted to record by the clerk of the county court of Ohio county, without any certificate of its acknowledgment or proof endorsed thereon, or annexed thereto, was improperly admitted to record, not having been acknowledged or proved, and recorded in the manner prescribed by law, and must be considered as an unrecorded deed.

By sec. 5, of ch. 74 of the Code it is declared that every * * * * * * deed of trust or mortgage conveying real estate or goods and chattels shall be void as to creditors, and purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such * * * * * * * * deed may be. The deed to Cox, not having been duly recorded, is therefore void as to subsequent purchasers without notice, of the 175 acres of land thereby conveyed to him in trust to secure the said debt of $4,600.00; but the same is nevertheless valid and binding as between

the grantor, and trustee and beneficiaries therein, and a against subsequent purchasers of the same land with notice of said trust-deed. It is well settled that a creditor obtaining a mortgage or deed of trust upon the property of his debtor, must claim the same as a purchaser, and can not claim it in the double character of creditor and purchaser. 2 Leigh 84. In asserting this principle Judge Lomax says: In regard to purchasers it would seem reasonable also, that purchasers, within the act relating to registration of conveyances, should be understood to mean the same description, as purchasers within the act relating to fraudulent conveyances. And as under the latter, creditors acquiring in any way, a lien upon their debtor's property by contract with him, are regarded as purchasers, they would be, in like manner regarded under the former. 2 Lomax Dig. 489; *Tate* v. *Liggatt, &c.*, 2 Leigh 104; *Evans* v. *Greenhow*, 18 Gratt. 153; *Bird* v. *Wilkinson*, 4 Leigh 266; *Beck's administrator* v. *De Baptiste*, *Id.* 349; *Price* v. *McClannahan*, 2 Gratt. 309.

If such subsequent purchaser at the time he obtained his conveyance or deed of trust, had notice of the existence of the prior unrecorded deed he will be bound by such unrecorded deed in the same manner and to the same extent as if the same had been duly recorded. It a deed has been duly recorded in the proper county it is notice, to all subsequent purchasers of the property thereby conveyed.

Applying these rules of law to the facts in the case under consideration it becomes easy of solution.

The plaintiff Cox having failed to record his deed of trust, the same is void as to the trustee Peck and all the creditors secured thereby excepting Susan Edgington, George Edgington and Francis M. Wayt, who at the time it was executed, had notice of the prior unrecorded deed of Cox and they are therefore bound thereby, to the extent of his trust debt of $4,600.00. with interest thereon from August 2, 1875, still remains unpaid, but not to any greater extent. As by the terms of the deed of trust to Peck, Susan Edgington was to be first paid in full, and then all the other creditors of James Wayt mentioned therein including George Edgington and F. M. Wayt, were to be paid ratably. All of these excepting only Susan Edgington, George Edgington and Francis M.

Wayt, having obtained said deed of trust to Peck, without notice of the unrecorded deed of trust to Cox, they stand in the postition of subsequent purchasers for a valuable consideration without notice, and they are entitled to have there debts satisfied out of the trust subject, before any part thereof is applied to the satisfaction of the plaintiff's trust-debt of $4,600.00. But Susan Edgington being first in order of priority in Peck's deed of trust, she in legal effect, took the same subject to the amount due upon the said debt of $4,600.00 and therefore the payment of her trust-debt of $950.00, must be postponed, until there is realized from the trust subject, so much of said debt of $4,600.00 as may remain unpaid, and when that has been done, she is entitled to resume her position as first lienor in Peck's deed of trust and to be paid in full before any other portion of the proceeds of the trust subject can be applied in discharge of the plaintiff's debt; and the same is true of the defendants, George Edgington and F. M. Wayt, except that before they can resume their places as second lienors on Peck's deed there must be realized from the trust subject the further sum of $950.00 with its interest due to Susan Edgington. But as we have already shown, the other creditors secured in Peck's deed of trust, are as against the creditors secured by the deed of trust to Cox, to be paid in full, before the latter are entitled to receive anything, and as Susan Edgington cannot be postponed to any greater amount than what may remain unpaid upon said debt of $4,600.00, it necessarily follows that the several creditors secured in Peck's deed of trust, other than Susan and George Edgington and F. M. Wayt, are entitled to receive satisfaction out of the $4,600.00 and its interest, and that only the residue thereof can be applied as a credit upon the plaintiff's judgment. The proceeds of the trust-subject must then be applied to the satisfaction of $950.00 due to Susan Edgington, and then ratably to the satisfaction of the debts of George Edgington and F. M. Wayt respectively. After these payments are made the amounts due to McClure's administrator and to Vanmeter upon their judgments should be paid ratably, and the residue of such proceeds should be applied, first, to discharge any balance remaining unpaid upon the plaintiff's judgment, and

secondly, upon the judgment of Robert B. Wayt. The circuit court having by its decrees of June 2, 1883, and of December 10, 1883, ascertained the several liens on said land and fixed their priorities, and directed distribution of the proceeds of the sale thereof in accordance with the views herein expressed, we are of opinion that there is no error in said decrees for the causes assigned by the appellant. But inasmuch as the report of the commissioner ascertained and reported as due to the defendant James H. Wayt, a debt of $79.57, with interest from August 5, 1879, which was one of the debts secured by the deed of trust to Peck, and the plaintiff excepted to said report for that cause, and the court by its decree of June 2, 1883, overruled said exception, and declared the same a lien on said land, having priority over that of the plaintiff and decreed the same to be paid to him, and in its decree of December 10, omitted the same in the distribution of the proceeds of the sale of said land, we are of opinion that said last decree ought to be, and the same is now so amended that the said special commissioners shall, in making the distribution of said proceeds include said claim of $79.67 in the class therein fourthly to be paid, and shall pay to James H. Wayt the sum of $79.67 with interest thereon from August 5, 1879, until paid, and the same shall be held to be included among the payments by said decree directed fourthly to be made, before any part of such proceeds shall be paid to the plaintiff; and because the debt of $257.30 therein decreed to be paid to John Gardner, is also included in said class "fourthly" to be paid, and his name is omitted in the designation of the persons included in said class "fourthly" to be paid, when it is apparent from the context, that it was intended to be, and ought to have been inserted therein. And, that all uncertainty in this respect may be avoided, the said decree is further amended by inserting in the sixth paragraph thereof after the name of "Vanmeter," the name of John Gardner.

The third error assigned by the appellant was in over-ruling his exceptions to the report of the commissioner. They were based upon two grounds: First, that certain specified debts, all of which were included in Peck's deed of trust, had been improperly allowed priority over the

plaintiff's trust debt; and second, that all of these debts, save one, were improperly reported in favor of the defendant James H. Wayt, as the assignee of such creditors, as he and they, at the time of the execution of the deed to Peck, had notice of the plaintiff's unrecorded trust-deed. What we have already said in regard to the priorities of these two deeds of trust has effectually disposed of appellant's first ground of exception. The second is simply a question of fact. On this the commissioner has already passed, and found the facts against the pretensions of the appellant, and his finding has been approved by the court, and unless it clearly appears from the evidence returned with, and made part of the report, that the finding of the commissioner is unsupported by the evidence, the Appellate Court will affirm the action of the circuit court in over-ruling exceptions thereto for that cause. But in this case the evidence on which the commissioner acted is returned with and made part of his report, whereby it appears that while James H. Wayt, at the time of the execution of the deed to Peck, had notice of the unrecorded deed of the plaintiff, he did not own any of said debts, and that said several creditors to whom they then belonged had no notice of said unrecorded deed, and that they severally transferred their said demands, secured by said deed of trust to Peck to said James H. Wayt for a valuable consideration, and we are of opinion that he was entitled to the security afforded by said deed of trust to the same extent as his assignors held the same, and therefore the circuit court did not err in over-ruling the plaintiff's said bill of exceptions.

The decree of the circuit court of Ohio county rendered on the 2nd day of June, 1883, as well as its decree rendered on the 10th day of December, 1883, as herein amended, must be affirmed with $30.00 damages and costs to the appellees, against the appellant as executor of Jane Brown, and as executor of Ann Brown, deceased, to be paid out of the assets of his said testatrices in his hands to be administered.

AFFIRMED.

CHARLESTON.

26 821
41 635

BOGGS, ADM'R *v.* JOHNSON, ADM'R.

Submitted September 3, 1885.—Decided November 28, 1885.

In a suit by one partner against his co-partner for a settlement of the partnership accounts the statute of limitations begins to run from the time there is a settlement or account stated of the partnership business between the partners made several years after the dissolution of the firm, which they then believed and understood included and adjusted all the assets and liabilities of the firm; notwithstanding that it may have been subsequently found that there were then a few inconsiderable debts due from the firm still outstanding and unprovided for, which under the circumstances may be supposed to have been forgotten or omitted by inadvertance; and notwithstanding it may appear from such account stated that there were then a large number of debts due to the firm but which were by it apportioned among the pratners according to their respective interests.

G. A. Blakemore for appellant.

W. H. H. Flick for appellee.

SNYDER, JUDGE:

At August rules, 1869, Edmund W. Boggs, administrator of James Boggs, deceased, filed his bill in the circuit court of Pendleton county against John D. Johnson, administrator of Samuel Johnson, deceased, and Jacob F. Johnson, to settle the partnership accounts of the late firm of Boggs & Co., composed of the said James Boggs, Samuel Johnson and Jacob F. Johnson. A statement of the nature and object of the suit and the proceedings had in it up to September 9, 1876, may be found in the opinion of this Court pronounced at that date on a former appeal.—9 W. Va. 434.

After the cause was remanded, the circuit court referred it to a commissioner to re-state the accounts between the partners. A report was made which upon exceptions by Samuel Johnson's administrator was twice re-committed and then the final report was made, finding the estate of Samuel Johnson indebted to the other members of the late firm of Boggs & Co. $2,512.44 as of August 30, 1878. The administrator of Samuel Johnson excepted to said final report, *First*, because

the whole account was barred by the statute of limitations, and *Second*, because the report allowed interest on advancements made by James Boggs, the plaintiff's intestate, to the firm during its existence. The court by its decree, entered April 9, 1879, overruled said exceptions, confirmed the report and ordered the administrator of Samuel Johnson to pay out of his intestate's estate the said sum of $2,512.44 with interest thereon from August 30, 1878, and the costs of the suit. From this decree the administrator of Samuel Johnson obtained this appeal and *supersedeas*.

As stated in the former opinion of this Court, James Boggs, Samuel Johnson and Jacob F. Johnson as partners under the firm name of Boggs & Co., carried on a general mercantile business in the town of Franklin, Pendleton county, in this State, from April 1849, to April 1854, Boggs being the owner of the one half of the concern and the Johnsons the other half in equal portions. After the dissolution of the firm in April, 1854, Boggs took the stock of goods on hand at a fixed price and continued the business on his own account at the same place with Samuel Johnson as his clerk. The accounts and notes of the late firm were also left in the hands of Boggs to be closed up and settled. There is nothing in the record to show what was done, if anything, in the way of closing up the partnership business from that time until about May, 1860, when, upon the request of the Johnsons, Boggs made out and exhibited to them the written statement referred to as "Exhibit B," showing the condition of the assets and liabilities of the firm as between the partners themselves at that time. As the result of this suit depends to a great extent upon the effect of said exhibit and as that was the principal question argued on this appeal, I here give it in a condensed form:

Boggs & Co.

1849	To JAMES BOGGS,	*Dr.*
April 10,	To am't of invoice, &c.	$ 3,480 62
	To am'ts paid in Balt. at different times between Oct. 1849, and Oct. 1854	13,790 88
1854		
April 10,	To int. on am'ts paid in Balt. to date	1,907 89
	To expenses to and from Balt	70 00
	To rent of store-house five years	175 00
		$19,424 39

Deduct last invoice	$2,776 59	
Boggs received from firm	9,217 88	
Cash	300 00	12,294 47
Amount due Boggs		$ 7,229 92
Boggs' portion of bad debts		2,322 77
Balance		$ 4,907 15
Supposed good debts		$ 5,623 45
Balance, *supra*		4,907 15
Surplus over Boggs's investment		$ 716 30
Jacob T. Johnson received	$2,886 03	
To your part of bad debts	1,161 38	4,047 41
By your investment		1,778 11
		$ 2,269 30
Samuel Johnson received	$4,303 54	
To your part of bad debts	1,161 38	5,464 92
By your investment		$ 2,000 00
		$ 3,464 92

James Boggs died in January 1862, and Samuel Johnson in July or August of the same year. Jacob F. Johnson, the surviving partner, in 1866 by a written agreement, signed by him and the administrator of Boggs, transferred to the estate of Boggs any interest he might have in the partnership, and the said administrator released him from any liability to said estate on account of the partnership. This made said Johnson a competent witness *against* the estate of said Boggs in this suit under the provisions of secs. 22 and 23 of chap. 130 of the Code of 1868.—*Carlton* v. *Mays*, 8 W. Va. 245.

In regard to the above statement the said Jacob F. Johnson, whose deposition was taken November 3, 1869, testifies: "I asked Boggs to make out his account against the firm; after a long time by being frequently asked to do so, James Boggs made out his account against the said firm, which acount was examined by myself and Samuel Johnson and found correct. I then asked Boggs how he was to be paid; he answered out of the debts due the firm. I then told him, in the presence of Samuel Johnson, to pay himself. The debts due the firm were still in his possession. He, Boggs, said he would make a list of the good and bad debts, and

then, as I understood, he would pay himself. Samuel Johnson continued in the store as clerk for Boggs after the dissolution of the partnership, and in the fall and spring when he, Boggs, was going after goods for himself, he called me, in the presence of Samuel Johnson, and divided the money which had been paid on the partnership debts equally between himself and Samuel Johnson and myself, giving us one half of the amount thus received. We, Samuel Johnson and myself, telling him not to pay us any money that we would have to pay back to him, and on that condition I took my share, one fourth. The papers of the firm remained in his, Boggs' hands up to his death."

This is all the testimony in the cause in regard to said statement. The commissioner reports that after the deaths of James Boggs and Samuel Johnson, the administrator of the former paid off two debts of the late firm, the one of $100.00, and the other of $277.36; also three small clerk's fees. The said administrator testified that he had collected since the war about $750.00 of the class known as "bad debts." These matters, in my view of the facts, are not very material. The important question is, was the claim asserted in the plaintiff's bill barred by the statute of limitations at the time this suit was brought? The solution of this question depends upon the effect of "Exhibit B," interpreted with a due regard to the situation of the parties and the surrounding facts and circumstances. It is contended by the appellant that said exhibit was in fact a final adjustment and closeing up of the entire partnership affairs between the members of the firm, and that it was so intended and understood by each and all of them at the time. On the other hand, it is insisted by the plaintiff, that it was not in fact or intended by the partners to be a final adjustment between them, but that it was simply a partial statement of the condition of the partnership at the time. If the the position of the appellant is correct that disposes of this cause; for the claim sued for in that view is clearly barred by the statute of limitations.

"In order to subject a suit brought by one partner against his co-partner to the bar of the statute of limitations, it must not only appear that there has been a dissolution of the partnership more than five years before the institution of the

suit, but that there were no valid claims of debit or credit against or in favor of the firm, paid or received, or outstanding within that time." *Sandy* v. *Randall*, 20 W. Va. 244.

The law has thus been declared by this Court and we think correctly. The doctrine thus laid down is unquestionably the general rule on the subject. *Foster* v. *Risen*, 17 Grat. 321. The case of *Sandy* v. *Randall*, *supra*, was a suit for the settlement of a partnership in which no attempt had been made to settle or close it up among the parties. In that respect it is different from this, because in this it is conceded that there was at least a partial settlement or adjustment of the partnership affairs. There is no dispute that the partnership was in fact dissolved in April, 1854. It is certain, however, that the mere dissolution of the partnership did not start the running of the statute of limitations as between the partners. In order to do that the affairs of the partnership must be fully adjusted and closed. All the debts and liabilities of the firm must have been paid or provided for, and all the assets, including the debts due to it, must have been collected, abandoned or disposed by partition among the partners or otherwise. In the language of the statute there must have been such a closing up of the firm's business among the partners as will effect "a cessation of dealings in which they are interested *together*." Was such the effect of "Exhibit B." in this instance? The amount due by each member to the firm is ascertained and fixed by the exhibit and the correctness of this was assented to by all of them. All the liabilities and assets of the firm, including the debts, good and bad, due to it, so far as the exhibit itself discloses, are embraced and adjusted in it. Upon its face it plainly shows a full settlement of all the partnership affairs, and a division or adjustment of the assets and liabilities among the partners. The rights and liabilities of each partner are definitely fixed and the data given from which, by a simple mathematical calculation, the amount due to or from each partner to the others could be precisely determined. This may be proved as follows: The results on "Exhibit B." show that the respective partners, crediting the whole of the good debts to Boggs and each with his portion of the bad debts, are indebted to the firm as follows: Boggs $716.30, Jacob F. Johnson $2,269.30,

and Samuel Johnson $3,464.92, the whole aggregating $6,450.52, of which Boggs' share is one half or $3,225.26, from which is to be deducted the $716.30 due from him to the firm, leaving $2,508.96 due to Boggs from the two other partners. Jacob F. Johnson's share of the above aggregate is one fourth or $1,612.63, which being subtracted from $2,269.30, the amount due from him to the firm, leaves him indebted $656.67. Samuel Johnson's share of the aggregate is also one fourth or $1,612.63, which being deducted from $3-464.92, the amount due from him to the firm, leaves him indebted $1,852.29 which being added to the $656.67 due from Jacob F. Johnson amounts to $2508.96, the precise sum due as we have seen to Boggs.

The result will be the same if we entirely eliminate the respective portions of the bad debts credited to the several partners in "Exhibit B.," that is, Jacob F. Johnson will be found indebted to Boggs $656.67 and Samuel Johnson $1,852.29, which two sums aggregate $2,508.96, the amount due to Boggs.

The plaintiff states the contents of this "exhibit B" in his bill and files it as a part thereof. There is no allegation of or attempt to prove either fraud or mistake. The only allegations relied on to sustain the bill are that there was "no full settlement of said partnership," that "said firm then had debts still outstanding unpaid some of which have been but recently settled by the plaintiff, and some are still outstanding," and "that there are still uncollected outstanding debts due said firm."

Whether there was or not a full settlement depends upon the true meaning and effect of "Exhibit B." The proof entirely fails to establish that there were any outstanding debts due the firm other than those included in said exhibit and therein divided among or credited to the partners. All the debts due the firm, whether classed good or bad, were disposed of among the partners and thereafter the respective portions of said debts assigned to each became his individual property. The whole of the good debts were transferred to Boggs and all the bad debts were divided among the partners according to their several interests in the firm. The Johnsons then left their portions of said bad debts in the

hands of Boggs, not as a partner but as their agent to be collected by him as such as far as practicable and applied to the balance found due him by the settlement from them respectively. The fact then that either Boggs or his administrator, the plaintiff, collected some of said bad debts since the settlement is wholly immaterial; because, if so collected they were collected for and as the property of the parties as individuals and not as partners or as partnership assets.

As to the allegation and proof that there were then outstanding unpaid debts due from the firm, it will be observed, that the proof shows there were but two debts of any importance discovered or paid since said settlement. Even these two are of such inconsiderable amount that we may presume, if they were not in some manner provided for either before or at the time, they were simply omitted by inadvertence or forgetfulness. The fact that it is subsequently made to appear that a few inconsiderable items were omitted from a settlement, which on its face appears to be a full settlement, is not of itself sufficient to prove that it was not intended by the parties to be a full settlement. *Prima facie* it will be treated as in full, and the burden to establish it was not so intended is thrown upon the party who seeks to impeach it. Story's Eq. Pl. §§ 251, 800, 802, 527; Adams' Eq. 441 (226); *Shugart* v. *Thompson*, 10 Leigh 434; 2 Dan. Ch'y. 850; *Ruffner, &c.* v. *Hewitt, &c.*, 7 W. Va. 585.

By the code of Virginia, which is also the law in this State, it is declared that "an action by one partner against his copartner for a settlement of the partnership accounts * * the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after." (Code of Va. 1860, sec. 5, ch. 149; Acts 1882, sec. 6, ch. 102.)

This statute has been repeatedly held to apply to suits in equity as well as actions at law. (*Coalter* v. *Coalter*, 1 Rob. 79; *Marsteller* v. *Weaver*, 1 Gratt. 391; *Foster* v. *Rison*, 17 *Id.* 321; *Sandy* v. *Randall*, 20 W. Va. 244.

In *Foster* v. *Rison*, *supra*, the court decided that "a partial settlement to which there is no valid objection, is conclusive upon the parties to it as far as it goes, and leaves open only the unsettled portion of the account; and the

statute begins to run from the time of the settlement as to that portion of the account embraced in it."

In the case before as both the settlement itself and the evidence in regard to it show that the parties understood it to be a final adjustment of all the partnership business; that is, that it was understood and believed by them to embrace all the matters relating to the partnership business in which they were interested together, and that it was the intention of the partners thereby to close up their joint affairs. They apportioned and set apart to each partner his portion of the assets on hand, and so ascertained the liabilities of the respective partners to each other that an action of debt or *assumpsit* could have immediately thereafter been brought by the one against the other for the amount of such liability. All the parties inspected and approved said settlement, and there is not only nothing in the record to show that it was not understood and intended to be full and final, but on the contrary all the proof and circumstances tend strongly to establish that such was in fact as well as in law the understanding and intention of all the partners. On the day after said settlement, Boggs might have brought his action at law thereon against Jacob F. Johnson for the $656.67 found to be due from him to Boggs in the manner hereinbefore shown, and likewise Boggs could have brought such action against Samuel Johnson for the $1,852.29 due from him to Boggs as aforesaid. There then having been a final settlement and "cessation of dealings in which the partners were interested together," in May, 1860, and the plaintiff's intestate having at that time a cause of action against his co-partners for the balances due from them to him, the statute began to run at that date and his demand became barred by it at the expiration of five years next thereafter.

I am therefore of opinion that the circuit court erred in overruling the appellant's first exception to the report of the commissioner. For this error the decree of said court must be reversed, the said exception sustained and the plaintiff's bill dismissed with costs to the apellant in this as well as the circuit court.

REVERSED. DISMISSED.

CHARLESTON

26 829
42 484

JOSIAH HENDERSON, ADM'R v. W. H. SMITH, JR.

Submitted September 11, 1885.—Decided November 28, 1885.

(JOHNSON, JUDGE, Absent.)

1. The official act of taking and certifying the acknowledgment and privy examination of a married woman to a deed, whether done by a court, justice or notary, is in the nature of a judicial act; and therefore the officer is not liable in damages for such act, however imperfectly he may perform it, unless he acted from malicious, impure or corrupt motives. (p. 837.)

2. Where a notary takes and certifies the acknowledgment and privy examination of a married woman, but omits from the certificate the words; "declared she had willingly executed the same and does not wish to retract it," the certificate is fatally defective; yet, as it is not alleged in the declaration, or proved, that the notary acted maliciously or corruptly, he is not liable in damages to the person injured for the loss occasioned by such invalid certificate. (p. 838.)

R. S. Blair for appellant.

W. L. Cole for appellee.

SNYDER, JUDGE:

Action of trespass on the case brought in the circuit court of Wood county by Josiah Henderson against William H. Smith to recover $1,000.00 damages sustained by the plaintiff by reason of the gross negligence and unskilfulness of the defendant in taking the acknowledgment of a certain trust-deed. The declaration contained three counts to all of which the defendant demurred. The court overruled the demurrer, the defendant pleaded not guilty and also special pleas upon which as well as the plea of not guilty issues were joined. The case was tried by a jury and a verdict found for the defendant, which the plaintiff moved the court to set aside, but the court overruled the motion and, on May 30, 1881, entered judgment for the defendant. During the trial exceptions were taken to certain instructions and rulings of

the court, and to review alleged errors in said rulings, the plaintiff obtained this writ of error.

All the evidence is certified, and as there is no conflict in the material parts of it, it may be treated as a certificate of the facts. The substance of the case thus certified is as follows:

The plaintiff, Henderson, having on deposit to his credit in the First National Bank of Parkersburg of which W. N. Chancellor was cashier and the defendant teller, agreed to loan said money to Anton Doerr upon the note of Doerr payable twelve months after date with interest, to be secured by a trust-deed executed by Doerr and wife to K. B. Stephenson, trustee, upon a house and lot in Parkersburg, of which the wife was the owner of the fee. The plaintiff employed said Stephenson who was a practicing attorney at law in Parkersburg to prepare and have said note and trust-deed executed, and directed said Chancellor as cashier of the bank to let Doerr have the money when Stephenson prepared the papers and brought them to the bank signed and executed. Accordingly, on April 5, 1870, Stephenson prepared the note and trust-deed, the note was signed by Doerr and the deed by Doerr and his wife, and then Stephenson took the deed to the defendant, who was then a notary public, and requested him to take and certify the acknowledgment of Doerr and wife which he did in the words following:

"WOOD COUNTY, WEST VIRGINIA, TO-WIT:

I, W. H. Smith, Jr., a notary public within and for the county of Wood and State aforesaid, do hereby certify that Anton Doerr, whose name is signed to the foregoing deed, bearing date the 5th day of April, 1870, personally appeared before me in my county aforesaid and acknowledged the same to be his act and deed. And I do further certify that Delia Doerr, wife of said Anton Doerr, whose name is also signed to the foregoing deed, bearing date the 5th day of April, 1870, personally appeared before me in my county aforesaid, and being examined by me privily and apart from her said husband, and having the deed aforesaid fully explained to her, she, the said Delia Doerr, acknowledged the same to be her act and deed. Given under my hand this 6th day of April, 1870.

W. H. SMITH, Notary Public."

The deed was recorded on the same day it was acknowledged, and then taken to Chancellor, and he, as cashier, paid over the money to Doerr, as he was directed by the plaintiff. Chancellor was not certain whether the defendant or Stephenson brought the deed to him when the money was paid over, but from all the circumstances I think it may be safely assumed that it was done by Stephenson, as the defendant never had the note, and it, as well as the deed, must have been delivered to Chancellor before he paid over the money. The plaintiff was not in Parkersburg at the time the deed was executed and the money paid over. When the note became due Doerr was insolvent, the trust-deed was declared by a decree of the circuit court of Wood county, void as to Doerr's wife on account of the defective acknowledgment and certificate aforesaid, and by reason thereof the plaintiff lost the greater part of the said $1,000.00.

The question presented by this case is the extent of the liability of a notary public for taking and certifying a defective acknowledgment and privy examination of a married woman to a deed. The question is one of great importance and is of first impression in this State. In fact there are but very few cases, so far as I can find anywhere, on this particular question. The law seems to be well settled, that a notary who fails to make a protest of negotiable paper when it is required, or who neglects to give proper notice to the parties to be charged in case of dishonor, will be unquestionably liable for the loss occasioned thereby. In such matters he is regarded as standing in precisely the same position as any other agent who may be employed about a particular business, and will be held responsible for his negligence and mistakes when loss is occasioned thereby to the party employing him. *Marston* v. *Bank*, 10 Ala. 284; *Allan* v. *Merchants' Bank*, 22 Wend. 215; *Warren Bank* v. *Parker*, 8 Gray 221; *Bowling* v. *Arthur*, 34 Miss. 41; *Dorchester Bank, &c.* v. *New England Bank*, 1 Cush. 177.

It was held, however, in *Commercial Bank* v. *Varnum*, 49 N. Y. 269, that where a notary is directed to protest a bill on the wrong day by a bank which employs him for that purpose, he is not presumed to be a lawyer who is to revise the decision of his employer as to the character of the bill, and he cannot be held liable for following his instructions.

Proffatt, in his work on Notaries, sec. 64, says: "Notaries are requied to give bond in a majority of our States, for the true and faithful discharge of their duties. The question will arise as to the nature and extent of this guarantee, and as to what particular acts or ommissions it provides against. Does it insure one against the unskillfulness or incapacity of the notary in the discharge of his official acts, or does it merely assure against his negligence? There can be no questeon whatever that it does give a guarantee against his negligence, for it could hardly be maintained that he discharges his duties faithfully when he is guilty of negligence in his official acts; but it is quite a different question whether he can be held liable on his official bond for incapacity or mistake, when he acts in good faith to the best of his ability. There is no doubt, if he assumes to act in a given case as one posessing the requisite ability or skill, he can be held as any other agent, for any loss by reason of his incapacity, but then it can hardly be said he is guilty of unfaithfulness. For instance, suppose, in taking an acknowledgment, he has put before him, as is frequently the case, a certificate drawn by an attorney of one of the parties, and that he duly attests it with his signature and official seal, and that afterward it turns out the certificate is invalid for some ommission or informality, and loss is sustained thereby, is he liable on his official bond for the damages thus occasioned? We think this would depend on the nature of the ommission, as whether he omitted to certify to a fact to which he must certify *as having personal cognizance.* A case in California illustrates the position laid down above, and perhaps holds the notary to a stricter liability than would be the case elsewhere; but it was based on the statute which provided 'for any misconduct or neglect of duty in any of the cases in which any notary public appointed under the authority of this State, is authorized to act * * * he shall be liable on his official bond to the parties injured thereby for all damages sustained.' In this case the notary took the acknowledgment of a mortgage, and omitted to state in his certificate, as required by the statute, that the party acknowledging it was kown to him, or was identified by the testimony of a witness examined for that purpose. * * * The mortgage thus

recorded was held insufficient to give notice to a subsequent purchaser, and the result was that the party lost the security of his debt, as the mortgager was insolvent. The notary was held liable on his official bond for the amount of the debt and interest."

In this State notaries are appointed by the governor to hold thier offices during good behavior. They are required to take the oath of office and give bond in the penalty of not less than $250.00, nor more than $1,000.00, "for the faithful discharge of their duties, and for accounting and paying over as required by law all money which may come to their hands by virtue of the said office." They are also authorized to take the "acknowledgments of deeds and other writings, and the privy examination of married women respecting the same," and they are authorized to charge the fees for their services, chaps. 10 and 51 Code; ch. 4 Acts 1881, and ch. 20 Acts 1882.

By the common law, a married woman could not, by joining her husband in a deed, bar herself or those claiming under her of her own estate. In process of time, however, fines and recoveries were introduced for the purpose and by them the rights of the wife might be successfully transferred. But to prevent imposition upon her, it was subsequently provided by statute that, where a *feme covert* was one of the parties to a fine she should be privily examined, and if she refused her assent, the fine could not be levied. Thus while the privy examination was positively enjoined by the statute, yet if the wife was allowed to acknowledge the fine without such examination, she was, nevertheless bound by it, for it was held to be a judicial proceeding the record of which could not be contradicted except for fraud in the conusee whom equity would in such case consider a trustee for her. Such was the law in England when this country was first settled and for a long time thereafter.

Early in the history of Virginia, a deed accompanied by a privy examination of the wife, was made a substitute for the fine and was given by statute the same effect. At first this privy examination could only be taken before a court of record or two justices of the peace. In both cases the same requisitions were necessary. In both it was required that

the deed should be shown to the wife and explained to her, that she should acknowledge it as her act and deed and declare that she had willingly and freely signed, sealed and delivered it. Thus the law remained in Virginia until the revision which resulted in the Code of 1849. By that Code it was for the first time provided in that State, that a notary-public might take the privy examination of a married woman. The same statute provided the form in which such examination should be made and certified. Code Va., secs. 3 and 4, ch. 121. This form is substantially the same as the one previously required in that State, and is identical with the one adopted and in force in this State. Secs. 3 and 4, ch. 73, Code.

In *Harkin* v. *Forsyth*, 11 Leigh 294, 302, decided in 1840, the court in its opinion says: "Where this examination has been made in court, it must be conceded that it is altogether conclusive, and that no allegation can be admitted to contradict the entry upon record, however much that it may be at variance with the real facts. Though the judge or justice who may have examined her (the married woman) may have disregarded every requisite of the statute, yet when the term is once ended, the truth of the record never can be questioned, but the examination must be taken to have been in truth what by the record it appears to have been." The opinion then proceeds to show that an aknowledgment and privy examination taken *in pais* by two justices is of the same nature and must be given the same effect as if they had been taken before a court and entered upon its records. Such being the case, it seems to me, to follow as an unavoidable consequence, that, by authorizing a notary public to take such acknowledgments and privy examinations, the legislature must have intended to confer upon them duties of the same nature then and theretofore exercised by courts and justices, and to give their acts the like dignity and conclusive effect.

The reason as well as the nature and history of the subject, show that the official act of taking the privy examination of a married woman, whether done by a court, justice, or notary, is a judicial act, or as it is sometimes designated a *quasi*-judicial act. I have examined quite a number of authori-

ties on this subject and all of them without exception hold or treat such act as judicial in its nature. The following are some of the cases referred to *Harkins* v. *Forsyth*, *supra*; *Jamison* v. *Jamison*, 3 Whart. 457; *Wasson* v. *O'Conner* 54 Miss. 352; *Neal* v. *Taylor*, 9 Bush. 380; *Hunter* v. *Glasgow*, 74 Pa. St. 79; *Wilson* v. *Truer*, 20 Iowa 233; *Stevens* v. *Hampton*, 40 Mo. 404.

In 11 Leigh 307, the court says in regard to the statute: "It has authorized them (two justices) to take that privy examination which, in the levy of a fine, constituted part of a judicial proceeding, and never could be contradicted. It has empowered them to take and certify the examination and acknowledgment, which it also makes one of the functions of its courts of justice, and thus it appears to invest them with an authority judicial in its nature."

In *Jamison* v. *Jamison*, *supra*, the court says: "The judge or justice of the peace in taking an acknowledgment *acts judicially, not ministerially.* The law imposes on him the duty of ascertaining by his own view and examination the truth of the matters to which he is to certify and points out his precise duty. 3 Whart. 469; *Hall* v. *Patterson*, 1 P. F. Smith 289.

This Court in *Tavener* v. *Barrett*, 21 W. Va. 658, decided, that where a trust deed is acknowledged by a husband and wife before a notary who is one of the trustees in the deed, the acknowledgment and privy examination as to the wife is an absolute nullity. Judge Green in delivering the opinion of the Court, approving and adopting the language used by the Court in *Stevens* v. *Hampton*, *supra*, says: "The objection to the trustee taking such acknowledgment is analogous to the one forbidding a judge to pass upon his own case. Though this act may not be strictly judicial, it is of a judicial nature and requires disinterested fidelity." 21 W. Va. 688.

In *Kerr* v. *Russell*, 69 Ill. 666, the court, in a well considered and able opinion, held, as the necessary conclusion both of reason and the decided cases, that "The act of an officer in taking the privy examination of a wife and her acknowledgment of a deed, is in the nature of a judicial act, and no other evidence than the certificate can be received to prove the fact."—See *Enner* v. *Thompson*, 46 Ill. 221; Proffatt on Notaries, sec. 155.

The liability of a public officer to an individual for his negligent acts or omission in the discharge of an official duty depends altogether upon the nature of the duty as to which the neglect is alleged. Where his duty is absolute, certain, and imparative, involving merely the execution of a set task—that is, if the duty is simply *ministerial*—he is liable in damages to any one specially injured either by his omiting to perform the task or duty, or by his performing it negligently or unskillfully. On the other hand, when his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them where no corruption or malice can be imputed, and he keeps within the scope of his authority. It has been laid down as a general principle that if a public officer in such cases simply errs in the discharge of his duty, he is not liable.—*Donahoe* v. *Richards*, 38 Me. 376; *Reed* v. *Conway*, 20 Mo. 22; *Allen* v. *Blunt*, 3 Story 742; *Kendall* v. *Storks*, 3 How. 87.

An officer possessing such discretionary powers is spoken of as a judicial or *quasi*-judicial officer from the likeness of his discretionary functions to those of a judge who decides controversies between individuals.

Judges of courts of record are never accountable in damages for their judicial acts within their jurisdiction, even if they act corruptly or oppressively, being in such case impeachable only. *Yates* v. *Lansing*, 9 Johns. 395; *Taylor* v. *Moffatt*, 2 Blackf. 305.

The judicial privilege is enjoyed by the judges of inferior as well as those of the superier courts. But as these exercise special and limited powers no presumption of jurisdiction is made in their favor; and even where they act within their jurisdiction, the act complained of must have been done honestly and in good faith to exempt them from liability; that is, they are not liable, unless they acted from malicious, impure or corrupt motives. *Gregory* v. *Brown*, 4 Bibb 28; *Howe* v. *Mason*, 14 Iowa 510; *Briggs* v. *Wardwell*, 10 Mass. 356.

Persons exercising judicial functions, by whatever name they may be called, enjoy the protection of this judicial privilege. Indeed, any officer, sworn to act faithfully, according

to the best of his ability, and according as things shall appear to him, is a judicial officer within the rule. Thus jurors, in determining their verdict act judicially. So do courts martial, election-officers, commissioners in bankruptcy, &c. See Shear. & Red. on Neg., secs. 156 to 169, and cases cited.

The same officer may be charged with both judicial and ministerial duties. When he is in the exercise of the latter, that is, purely ministerial functions, he is of course not protected by the judicial privilege. He is liable for negligence, like every other ministerial officer. There is a distinction between those officers whose duties are of a general public nature and who act for the profit of the public at large, and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for specific fees paid. The same officer may have duties assigned to him, by law, of both classes of these duties. In our State justices, constables, notaries and sheriffs may be regarded as such, because these officers are made by statute conservators of the peace for which they receive no pay from individuals, while at the same time they each and all receive fees for services performed by them for individuals. But in the matter now before us this distinction is not very material. The important distinction is, between judicial or *quasi*-judicial functions and purely ministerial acts or duties. When the act done is of the latter character, whether done by a *quasi*-judicial or a ministerial officer, there never has been any question that the officer is liable in damages for any act of negligence or abuse of his office, to any individual specially injured thereby. *Robinson* v. *Chamberlain*, 34 N. Y. 389; *Adsit* v. *Brady*, 4 Hill 630; *Hoover* v. *Barkhoof*, 44 N. Y. 113.

I do not think there can be any question, according to both reason and authority, that the official act of taking and certifying the acknowledgment and privy examination of a married woman to a deed, whether done by a court, justice or notary, is in its nature a judicial act; and that the officer is not liable in damages for such act, however imperfectly he may perform it, unless he acted from malicious, impure or corrupt motives. It is a duty which requires judicial discretion, and therefore to exempt the officer from liability it is

only necessary that he should act honestly and in good faith according to the best of his skill and judgment.

This conclusion is adverse to the case of *Foyarty* v. *Finley*, 10 Cal. 239, *supra*, unless that case can be considered as simply an interpretation and enforcement of the California statute. We have no such statute; and if that case can be regarded as founded on the general law, it stands alone, unsustained by the decision of any other court so far as I have been able to discover, and it is, therefore, disapproved as being unsupported by either reason or authority.

In the case at bar, it is not alleged in the declaration or attempt to be proved, that the defendant acted either corruptly or maliciously. All the plaintiff alleges or offers to prove is, that the defendant acted negligently and unskillfully. The defect in the certificate is the omission of the essential words, that the wife "declared she had willingly executed the same and does not wish to retract it." Sec. 4 ch. 73 Code p. 470. This was unquestionably a fatal defect. *Watson* v. *Michael*, 21 W. Va. 568; *Grove* v. *Zumbro*, 14 Grat. 501.

This defect is apparent upon the face of the certificate; and it might therefore be regarded, as insisted by the defendant in error, that the loss sustained by the plaintiff was not the direct result of the negligence of the defendant, but that the proximate cause of the loss was the negligence and want of care on the part of the plaintiff or his attorney in having the deed so defectively acknowledged placed upon record and paying or loaning the money upon it. *Washington* v. *B. & O. R. R. Co.*, 17 W. Va. 190; *Lowery* v. *Telegraph Co.*, 60 N. Y. 198; *Pennsylvania R. R. Co.* v. *Kerr*, 353; *McClung* v. *The Sioux R. R. Co.*, 3 Neb. 44.

Having thus reached the conclusion that the plaintiff was not entitled to relief upon the case made by his declaration, nor upon the facts proved, it is unnecessary to consider the many objections and exceptions taken to the rulings of the court during the trial. The demurrer to the declaration should have been sustained. For the reasons aforesaid the judgment of the circuit court in favor of the defendant is affirmed.

AFFIRMED.

CHARLESTON.

DeCamp *v.* Carnahan *et al.*

Submitted September 14, 1885.—Decided November 28, 1885.

(Snyder, Judge, Absent.)

1. A case in which a motion to dismiss an appeal was overruled. (p. 841.)

2. A court of equity has a right to cancel a deed, which is a cloud upon the title of one out of possession of the land. (p. 842.)

3. Where an attachment-suit in equity was instituted to subject land to the payment of a debt, and the land was sold under a decree in said cause, and a deed was made for the property to the purchaser at such sale, but after the levy of the attachment the debtor conveyed for a valuable consideration the land to another, and no *lis pendens* was recorded, as is required by sec. 14 of ch. 139 of the Code, the purchaser from the debtor will hold the land as against the purchaser under the decree. (p. 842.)

4. And this defect in the title of such purchaser at the sale under the decree was such as all subsequent purchasers from him were bound to notice. (p. 844.)

Knight & Couch and *W. A. Quarrier* for appellant.

J. W. Harris for appellee.

Johnson, President:

Prior to September, 1874, the title to certain tracts of land and leasehold estates described in the pleadings and exhibits filed in the cause was in Andrew F. Baum, *five* twelfths, Robert Campbell *five* twelftths and W. W. Corbett *two* twelfths. For the purposes of this decision it may be regarded as not disputed in the record, that the defendant, the St. Lawrence Boom and Manufacturing Company, has the title now to the *seven* twelfths, the interest formerly owned by Baum and the controversy is over the interest formerly held by Robert Campbell. On September 14, 1874, Robert Campbell by three deeds of that date, all of which were recorded in Pocahontas county, where the said property is, on Septem-

ber 25, 1874, conveyed his said *five twelfths* interest to the appellant, DeCamp. On August 14, 1874, one Thomas Gillispie brought an attachment-suit in equity in the circuit court of Pocahontas county against said Campbell and others, and the attachment was levied on the said five twelfths interest of Campbell, on August 15, 1874. Such proceedings were had in said suit, that Campbell's interest was sold, and said Gillispie became the purchaser thereof and received a deed therefor under an order of the court, and by a series of conveyances the St. Lawrence Boom and Manufacturing Company became vested with just such title and no more, as was passed to the purchaser under the sale made in this suit. It is admitted that no *lis pendens* was recorded in the clerk's office of the county court of Pocahontas county, describing the attachment suit, and giving notice of the lien acquired by the levy of the attachment.

Under this state of facts George W. DeCamp on July 12, 1883, filed his bill in the circuit court of Pocahontas county against J. W. Carnahan, the St. Lawrence Boom and Manufacturing Company and others setting up the foregoing among other facts and praying that said deed to Gillispie and the other conveyances, by which the said five twelfths interest was attempted to be conveyed to the St. Lawrence Boom and Manufacturing Company, be cancelled, and that he be quieted in his title, and *for general relief*.

The defence by demurrer, and answer is, that a court of equity has no jurisdiction over the matters set up in the bill, and that the title acquired by Gillispie by and under the attachment-suit was prior and better than the title acquired by DeCamp by the deed from Campbell. No depositions were taken in the cause.

On April 9, 1884, the cause was heard on the pleadings and exhibits and arguments of counsel. "Upon consideration thereof the court was of opinion, that the plaintiff was not entitled to any relief as prayed for in the bill" and therefore dismissed the bill with costs.

From this decree the plaintiff Geo. W. De Camp appealed.

The counsel, who filed the answer of the defendant, J. W. Carnahan and also of two others of the defendants, after giving notice thereof on September 14, 1875, moved this court

then in session at Charleston to dismiss the appeal. The notice was given in the name of George W. DeCamp, the appellant, by counsel, and the ground of the motion was, that "said appeal was improperly applied for, taken and obtained in my name and behalf without any power, authority, or warrant of attorney whatever from me to you or any other person to do." The notice was directed to "Knight & Couch attorneys at law," one of which attorneys, E. B. Knight, Esq., having with W. H. Hogeman, Esq., applied for and obtained the appeal. The motion to dismiss was resisted. No affidavit of George W. DeCamp or other evidence was filed denying the authority of Messrs. Knight & Hogeman to represent him in the application for the appeal, and the affidavit of George Scranage is filed showing that DeCamp had given his authority to counsel to prosecute the suit. Under these circumstances the motion to dismiss the appeal must be overruled.

The two questions discussed in argument by counsel for appellant and the appellee, the St. Lawrence Boom and Manufacturing Company, are, first, that equity has no jurisdiction in this case, and that the title of the defendant, derived by sale under the attachment proceedings being prior to the title of the plaintiff is good and valid, and the plaintiff's title is bad.

A number of authorities hold that, where the party is in possession, he may bring a chancery suit to declare a deed void which is a cloud upon his title. (*Clouston* v. *Shearer*, 99 Mass. 209. *Sullivan* v. *Flannagan*, 101 Mass. 447.) But it has also been decided that if the party is not in possession he cannot maintain such suit. (*Branch* v. *Mitchell*, 24 Ark. 431. *Harrington* v. *Williams*, 31 Tex. 448. *Barron* v. *Ribbons*, 22 Mich. 35.)

In *Carter* v. *Taylor*, 3 Head 30, it appeared that the party was out of possession when he brought his suit in equity to cancel a deed which was a cloud on his title, and the court decided, that if a cloud rested upon the title of a party to real estate by reason of an unsatisfied mortgage or a deed made without authority, such person has the right to come into a court of equity to have said cloud removed, and his title quieted and perfected.

In *Bruce* v. *Gallagher*, 5 Blatchf. 481, it was decided by Shipman, judge, that a suit in equity to annul a forged deed of land and have it cancelled and the record of it declared void brought by the legal owner of the land, who is the grantor named in the forged deed, while he is out of possession of the land, is not taken out of equitable jurisdiction by the fact that the deed is void; that it is not necessary before bringing such suit for the legal owner to establish his title to and obtain possession of the land by ejectment at law; that such a suit is peculiarly one of equitable cognizance.

It seems to me, that in a case like the one at bar the remedy is not so full, adequate and complete at law as in equity. The parties will be obliged to rest, if the court holds that the deed sought to be removed as a cloud on the title is invalid and cancels it; and if the court refuses to cancel, because the deed is good and valid, they must also rest; for in either case the question is settled. That is a question which a jury cannot be permitted to pass upon in ejectment. But the question of jurisdiction is at rest in West Virginia. We have repeatedly taken jurisdiction of such cases. (*Grinnan* v. *Edwards*, 21 W. Va. 510. *Haymond* v. *Camden*, 22 W. Va. 180. *Sturm* v. *Fleming*, 22 W. Va. 404.)

The bill was also a good bill for partition, the court having jurisdiction to remove the cloud from the title to five twelfths of the property held in common. (*Almong* v. *Hicks*, 3 Head. 39) It is true the bill contained no special prayer for partition, but there was a prayer for general relief, and under this prayer a partition might have been asked for at the bar. (*Cook* v. *Martyn*, 3 Atk. 3.) If the plaintiff in a bill in equity in his special prayer mistakes the proper relief, it may be given under the general prayer, if consistent with that, which is specially prayed. No relief can be granted under the general prayer entirely distinct from and inconsistent with the special prayer. (*Brown* v. *Wylie*, 2 W. Va. 502.)

Should the court have decreed that the deed from the commissioner to Thomas Gillispie for the interest of Robert Campbell in the lands and leases in the bill mentioned and the several conveyances, by which said interest was at last conveyed to the St. Lawrence Boom and Manufacturing Company, were a cloud upon the title of the plaintiff and

void? The position taken by counsel for appellant, that such deeds could be declared void because of any irregularity in the proceedings in the attachment suit of *Thomas Gillispie* v. *Anshutz & Co.*, is untenable. In a collateral proceeding to set aside a sale made under a judgment of another court, it is not enough to show mere errors and irregularities. (*Ludlow* v. *Ramsey*, 11 Wall. 581.) In that case it was also decided, that it was not enough in a collateral proceeding to set aside a sale made under the attachment law of Tennessee, that the affidavit, on which the attachment issued, did not state, as the Code of Tennessee directs, that such affidavits should do, that the claim, to secure which the attachment issued, was a "*just claim.*" The errors and irregularities, if any existed in such suit, would have to be corrected in that suit on appeal.

The court under the statute had jurisdiction in equity of a purely legal claim upon attachment, and its jurisdiction, when it attached, was the same as the jurisdiction of a court in any other case. But it is admitted, that no *lis pendens* was recorded. That the statute in terms declared, sec. 14, ch. 139, p. 667, of our Code: "The pendency of an action, suit or proceeding to subject real estate to the payment of any debt or liability, upon which a previous lien shall not have been acquired in some one or more of the methods prescribed by law, shall not bind or affect a purchase of such real estate, unless and until a memorandum setting forth the title of the cause, the court in which it is pending, the general object of the suit, the location and quantity of land as near as may be, and the name of the person whose estate therein is intended to be affected by the action or suit shall be filed with the recorder of the county in which the lands are situated; and such recorder shall forthwith record the said memorandum in the deed-book, and index the same by the name of the person aforesaid."

It is insisted here by counsel for the appellee, The St. Lawrence Boom and Manufacturing Company, that the case here is excepted from the statute by the words "acquired by some one or more of the methods prescribed by law;" that the attachment-lien in this case was a lien of such a character, a clear, definite and distinct lien under the statute. The fallacy of this argument is, that the statute declares, that the

lien excepted from the operation of the statute must be a "*previous lien* acquired in some one or more of the methods prescribed by law." It must have been a lien acquired upon the real estate sought to be affected in that suit *prior* to the commencement of the suit. This was certainly *not* such a lien. This was acquired *after* the institution of the suit, or at the time of the institution of the suit in which it is sought to be enforced. It follows therefore, that, unless such *lis pendens* was recorded as prescribed by the statute, the lien could not bind or affect a purchaser of such real estate. The statute does not say, as the previous statute did, that it should not bind or affect a purchaser of such real estate "without actual notice thereof;" but it could not affect this case if it did, as it is not shown by the record, that the purchaser had actual notice thereof. By force of the statute then the title to George W. DeCamp conveyed by Robert Campbell of an undivided *five twelfths* of said land and leasehold property, was unaffected by the title acquired by the Boom Company under said attachment-sale; and this fatal defect of title was such, that all subsequent purchasers of said land so sold in said suit were bound to notice.

The decree of the circuit court of Pocahontas county, dismissing the plaintiff's bill at the hearing is therefore erroneous and is reversed with costs to the appellant; and the deed to Thomas Gillispie conveying said *five twelfths* interest, made by the commissioner in the cause of *Gillispie* v. *Anshutz & Co.*, and all the intermediate deeds for said interest including the deed for said five twelfths of said property to the said The St. Lawrence Boom and Manufacturing Company, in so far, and so far only, as they purport to convey such interest of said Campbell, as was sold under said attachment-proceedings, are declared null and void; and this cause is remanded for further proceedings, or to enter a decree for costs, for plaintiff, as may appear proper.

Reversed. Remanded.

INDEX.

ABATEMENT.

1. Although the record shows, that the defendants were entitled to an abatement amounting to $41.25, yet, as that is not sufficient to give this Court jurisdiction, the cause will not be reversed for that reason, but, as the Court has jurisdiction on other grounds the decree will be corrected and affirmed. *McCoy* v. *Bassett*, 571.

2. Where by consent of the vendor the vendee sold a portion of land to a third party with the understanding that, if he paid for it to the original vendor at the price he sold it for, the deed should be made to him, and he fails to perform the contract, no abatement should be allowed on this ground. *Id.*

ACKNOWLEDGMENT.

1. The official act of taking and certifying the acknowledgment and privy examination of a married woman to a deed, whether done by a court, justice or notary, is in the nature of a judicial act ; and therefore the officer is not liable in damages for such act, however imperfectly he may perform it, unless he acted from malicious, impure or corrupt motives. *Henderson* v *Smith*, 829.

2. Where a notary takes and certifies the acknowledgment and privy examination of a married woman, but omits from the certificate the words ; "declared she had willingly executed the same and does not wish to retract it," the certificate is fatally defective ; yet, as it is not alleged in the declaration, or proved, that the notary acted maliciously or corruptly, he is not liable in damages to the person injured for the loss occasioned by such invalid certificate. *Id.*

See *Recordation*, 1-5.

ADMINISTRATORS. See *Ex'rs and Adm'rs*, 3.

AD QUOD DAMNUM. See *Repeal*, 2.

ADVERSE POSSESSION.

It is not necessary to the assertion of an adverse possession, that the party should be ignorant of the defects of his own title and have no knowledge of the rights of those against whom he claims. He may know he has a bad title and that another has the true title. Still if he occupies and claims the land as his own for the statutory period the title will by operation of the statute be transferred to him. *Jones* v. *Lemons*, 630.

See *Ejectment*, 1, 2.

AFFIDAVIT. See *Attachment*, 1–3; *Jurisdiction*, 2; *Appeal*, 4.

AGREEMENT.

If the language of a written agreement is on its face ambiguous, the courts will look at the surrounding circumstances, at the situation of the parties and the subject-matter of the contract, and at acts done by the parties under it for aid in giving a construction to its language, but not to the verbal declarations of the parties. *Titchenell* v. *Jackson*, 460.

See *Trusts and Trustees*, 6.

ALLEGATA AND PROBATA. See *Chy. Pl. & Pr.*, 1, 2.

AMENDMENT. See *Chy. Pl. & Pr.*, 2; *Injunction*, 4.

ANSWER. See *Exception*, 5, 6; *Removal of Causes*, 1; *Demurrer*, 1, 2; *Corporations*, 1, 2; *Record*, 2.

APPEAL.

1. Under the provisions of our statute, sec. 3, ch. 44 of Acts 1877, and sec. 3, ch. 157 of Acts 1882, no petition can be entertained by this Court for an appeal from any decree of any character, which was rendered more than five years before the petition is presented for the appeal. *Lloyd* v. *Kyle*, 534.

2. Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken. *Id.*

3. A party can not be granted an appeal upon a petition assigning errors in *appealable* decrees rendered more than five years before his petition is presented, although the errors thus assigned may be the foundation of and be given effect in a subsequent decree rendered within five years, from which an appeal is also prayed. The petition must show that the party is entitled to an appeal from such subsequent decree alone, or the appeal can not be properly allowed; and if inadvertently allowed, it will be dismissed. *Id.*

APPEAL.—*Continued.*

4. This Court will not dismiss an appeal upon the *ex parte* affidavit of the appellee taken without notice to the appellant stating that the appellant has assigned his interest in the suit, and that the appeal is prosecuted for the benefit and at the costs of the assignee. *Ayers* v. *Blair*, 559.

5. B. is in the possession of lumber cut from A's land. B. sawed this lumber and bestowed other labor on it and under contract between them he claims a right to hold possession of this timber and sell it and out of the proceeds retain what is due him for his labor bestowed thereon. A. claims that B. has no right to ship this lumber in his own name but only in A's name; and that for what he may owe B. on account of his sawing of this lumber and other labor bestowed thereon B. has no remedy except by a common law suit, having under their contract no lien upon the lumber. A. brings a chancery suit against B. enjoining him from collecting certain moneys for a portion of this lumber shipped by B. in his own name and sold by him, as A. claims, improperly and to prohibit him from selling any more. The court at the instance of B. orders a receiver of the court to take possession of the lumber then in B's possession and unsold and sell the same and bring the money into court, at the same time ordering a settlement of the accounts between the parties, but settling none of the principles of the cause. HELD:

   This is not such an order, as A. can appeal from and thus get a decision on the merits of the cause, before it has been adjudicated in the court below, as such order is, so far as A. is concerned, not an order changing the possession of property. *Harris* v. *Hauser*, 595.

6. A defendant, against whom a decree has been rendered upon bill taken for confessed, can not appeal to this Court for the review of alleged errors in such decree, until after he has first applied to the court below for the correction of such errors in the manner prescribed by sec. 5, ch. 134 of Code. If an appeal is granted from such decree, it will be dismissed as having been improvidently awarded. *McKinney* v. *Hammett*, 628.

7. A non-resident party, against whom a decree has been rendered upon order of publication, must proceed in the manner prescribed by the statute for the review of such decree and can not in the first instance appeal therefrom to this Court. *Handy* v. *Scott*, 710.

8. A decree is entered of record confirming a judicial sale, but before the end of the term the said decree is set aside by an order of the court, and at a subsequent term a decree is entered setting aside said sale and ordering a re-sale of the property. HELD:

   I. That no appeal lies to this Court fram the order setting aside the decree confirming the sale; and

APPPEAL—*Continued.*

II. Under the decision of this Court in *Childs* v. *Hurd*, 25 W. Va., 530, the purchaser can not appeal from the decree setting aside the sale, before the re-sale is made and confirmed. *Bank* v. *Jarvis*, 785.

See *Justice of the Peace*, 1.

APPELLATE COURT. See *Commissioner*, 2-4, 7, 8; *New Trial*, 8; *Parties*, 4; *Record*, 2; *Commissioner*, 9.

ARBITRATION AND ARBITRATORS.

1. An umpire may be selected either before or after a disagreement between the arbitrators. *Rogers* v. *Corrothers*, 238.

2. Where a submission "authorizes and directs the arbitrators to select an umpire" it means, if there should be disagreement, the umpire shall settle it. But if under such submission there is no disagreement, and no umpire is chosen, the award will not be bad, because the arbitrators did not choose an umpire. *Id.*

3. A statutory award is complete, when it is signed and published and ready to be returned to court; and when it is so made, the authority of the arbitrators is spent, and they are *functus officio*. *Id.*

4. When an award is made, the arbitrators can not change it, and though they do attempt to change it, effect may be given to it as it originally was. *Id.*

5. A party, who himself has been the only cause of misbehavior on the part of the arbitrators or either of them, can not be heard to complain of such misbehavior. *Id.*

6. Technical precision and certainty are never necessary in an award. If it be expressed in such language, as plain men acquainted with the subject-matter can understand that is enough. *Id.* 239.

7. If an award settling a corner and lines between two tracts of land shows that two points one in each of two lines are ascertained, they will be regarded as fixed and certain, unless the record shows that they are uncertain, and the award gives directions to ascertain where the corner, which must settle the dispute, is located by the award, and in such a manner that any competent surveyor could from such award find the corner and lines, the award is certain. *Id.*

8. Where arbitrators have made and published their award, and at the instance of one of the parties they change the award, and the award so changed is returned to court, and the other party moves to have the changed award entered up as the judgment

ARBITRATION AND ARBITRATORS—*Continued.*

of the court, and it is so entered up against the protest of the party at whose instance the original award was changed by an addition thereto, whereby it was made more favorable to him, said party is not prejudiced by entering up the second or changed award instead of the first. *Id.*

See *Ex'rs & Adm'rs*, 3.

ASSAULT. See *Indictment*, 2, 3.

ASSESSMENT. See *Taxes*, 1.

ASSETS. See *Statute of Limitations*, 5.

ASSIGNOR AND ASSIGNEE. See *Recordation*, 7.

ATTACHMENT.

1. An affidavit for an order of attachment which states, as the ground for the order, "that the defendant has property *or* rights of action which he conceals," is sufficient, notwithstanding the disjunctive *or* is used—it being apparent that but one ground for the attachment is alleged under the statute. *Sandheger* v. *Hosey*, 221.

2. An affidavit alleges the "material facts" for an attachment to be "that the defendant is hiding and concealing a large part of the stock of liquors and wines which the plaintiff sold and delivered to him." HELD:

   Insufficient to sustain the order of attachment. *Id.*

3. Under sec. 11 of ch. 151 of the Code of 1860, a foreign attachment suit in equity is brought, the affidavit is in form, except it does not state "the nature of the plaintiff's claim" as required by the amendment of 1867 to the first section of the chapter; a few months afterwards, but before any other rights had attached to the subject, an unexceptionable affidavit was filed, but there was no other order of attachment issued, and no other levy made. HELD:

   The lien attached to the land as against everybody at least from the filing of the second affidavit. *Chapman* v. *Railroad Co.*, 300.

4. Because *pendente lite* the defendant railroad company has taken possession of the strip of land attached, on which was a road-bed and railroad-track, at the time the attachment was levied, it has no right to insist, that a section of a railroad can not be sold. It takes the property if at all *cum onere*. *Id.*, 301.

5. When there has been in a foreign attachment suit in equity an ascertainment of the amount of the indebtedness due from the defendant to the plaintiff, and the debtor appeals from the decree so ascertaining the amount, which is affirmed, and the court below is proceeding to execute the decree by selling the attached property, it is too late for a claimant of the property to dispute the debt. *Chapman* v. *Railroad Co.*, 324.

ATTACHMENT—*Continued.*

6. Where under sec. 24 of ch. 106 of the Code a claimant of the property files a petition, unless the petition and the accompanying exhibits show a legal or equitable claim to the property, the court does not err in refusing to empanel a jury to enquire into the claim. *Id.*

See *Mortgage*, 1-3; *Exception*, 6; *Title*, 2.

ATTEMPT TO COMMIT OFFENCE. See *Indictment*, 1.

AWARDS. See *Executors and Administrators*, 3; *Arbitration and Arbitrators*, 2-4, 6-8.

BALLOTS. See *Elections*, 2.

BANKRUPTCY.

1. After an adjudication in bankruptcy all the property of the bankrupt passes to the assignee, who takes it subject to all the liens and equities then existing against it. *Beall* v. *Walker*, 741.

2. The bankruptcy-court has the right and the power to enjoin the prosecution of any suit thereafter instituted in a State-court to enforce any previous lien against the bankrupt's property; as it has the right to administer fully upon the estate of the bankrupt liquidating and settling all liens or ordering the property sold subject to the liens. *Id.*

3. When the bankruptcy-court orders the property sold subject to the liens, there is no reason why the State-court should not proceed to enforce the liens. *Id.*

4. Where neither the bankruptcy-court, the assignee nor any creditor objects, the State-court has jurisdiction to proceed with such suit to enforce the liens. *Id.*

5. The assignee should be made a party to such suit. *Id.*

6. The State-court but for the proceeding in bankruptcy has jurisdiction to enforce a lien against the land of a debtor, and if that jurisdiction is not ousted by the interference of the bankruptcy-court or proper pleading in the cause by the assignee or creditor of the bankrupt, the State-court may lawfully proceed to enforce the lien. *Id.*

7. The lien is by the Bankrupt Act expressly saved and respected; and while the bankruptcy-court has the undoubted right to enforce the lien itself and may by injunction prevent the State-court from the enforcement of it, yet by the active or passive permission of the bankruptcy-court the State-court may proceed with the enforcement of the lien. *Id.*

BETS. See *Verdict*, 2.

BILL IN EQUITY. See *Trespass*, 2.

BILL OF EXCEPTIONS.

Upon a writ of error to a judgment overruling a motion to set aside a verdict and to award a new trial, on the ground that the verdict was contrary to the evidence, and the evidence and not the facts proved is certified in the bill of exceptions, the appellate court will not reverse the judgment, unless after rejecting all the conflicting parol evidence of the exceptor and giving full faith and credit to that of the adverse party the decision of the trial-court still appears to be wrong. (See *Black* v. *Thomas*, 21 W. Va. 709.) *State* v. *Flanagan*, 117.

See *Record*, 1; *New Trial*, 2.

BILL OF REVIEW. See *Commissioner*, 5–7.

BILL TAKEN FOR CONFESSED. See *Appeal*, 6.

BOND, OFFICIAL. See *Vendor's Lien*, 6, 7.

BOND TO KEEP THE PEACE.

The court in rendering a judgment upon a verdict of guilty under this statute, or in rendering judgment against a defendant in any case upon the conviction of him of any misdemeanor has no right to add to its judgment as a part thereof an order requiring the defendant to give a bond with approved security to keep the peace or be of good behaviour and in default thereof to be imprisoned, till such bond is given. If this be done, the case on writ of error will be reversed, and the proper judgment will be entered by the appellate court without remanding it to the court below. *State* v. *Gould*, 259.

BOUNDARIES. See *Jurisdiction*, 7.

BUYER AND SELLER. See *Trover*, 3–6; *Vendor and Vendee*.

CERTIFICATE. See *Acknowledgment*, 2.

CERTIORARI See *Habeas Corpus*, 3; *Elections*, 1

CHANCERY PLEADING AND PRACTICE.

1. A plaintiff in equity can not obtain relief by alleging one ground or state of facts, on which he claims the relief in his bill, and by his proofs establishing a different ground or state of facts entitling him to relief. The *allegata* and the *probata* must correspond in all material respects, or relief will be denied. *Doonan* v. *Glynn*, 225.

2. But if in such case the proofs show that the plaintiff has a cause which entitles him to relief, that it is of a similar nature to that

CHANCERY PLEADING AND PRACTICE—*Continued.*

alleged in his bill and such as might be made available by proper amendments of his bill, the court on the hearing should not dismiss his bill without giving him an opportunity to amend within a reasonable time. *Id.*

See *Attachment*, 1, 2; *Exception*, 5, 6; *Demurrer*, 1, 2; *Jurisdiction*, 2–4; *Parties*, 1, 2; *Corporations*, 1, 2; *Jurisdiction*, 6, 7; *Trespass*, 1, 2; *Vendor's Lien*, 4–7, 8, 9.

CIDER.

1. The sale of cider or crab-cider without a State license therefor is not prohibited by the first section of ch. 107 of the Acts of the Legislature of 1877. *State* v. *Oliver*, 422.

2. According to the true intent and meaning of said statute neither cider nor crab-cider is included in the terms "spirituous liquors, wine, ale, porter, beer, or any drink of like nature." *Id.*

CIRCUIT COURT. See *Elections*, 1; *Pl. & Pr.*, 3.

CIRCUMSTANTIAL EVIDENCE. See *Evidence*, 8–10.

CLERK OF CIRCUIT COURT. See *Pl. & Pr.*, 3.

CLERK OF COUNTY COURT. See *Recordation*, 1–5.

CO-DEFENDANTS. See *Pl. & Pr.*, 6.

COMMISSION. See *Ex'rs & Adm'rs*, 2.

COMMISSIONER.

1. When a decree appealed from consists in part of an order of reference for a report upon certain specified matters and for such other matters, as the commissioner may deem pertinent or be required by any party, if such order is justified by the pleadings and proofs as to the matters specified, this Court will not, before such report is made and acted upon by the court below, reverse or consider the order because some party under said general clause may require irrelevant or improper matter to be reported to the court. *Sturm* v. *Fleming*, 54.

2. Where an exception is not taken to a commissioner's report in the court below, and the matter objected to in the Appellate Court might be affected by extrinsic evidence, the Appellate Court will not consider such objection. *Bank* v. *Shirley*, 563.

3. But where no exception is taken to the commissioner's report in the court below, and no error appears on the face of the report, but when taken in connection with the pleadings in the cause the error in the report does clearly appear, such error will be considered and corrected by the Appellate Court, it being impossible in such case to be affected by any extrinsic evidence. *Id.*

COMMISSIONER—*Continued.*

4. Where one commissioner's report shows error on its face in the calculation of interest, and it is set aside, and another report is made, which shows the balance of the debt to the time of making the report "after allowing all credits," and no exception is taken to the last report, the Appellate Court can not go back of the last report to consider errors apparent on the face of the first. *Id.*

5. An error in the calculation of interest can be corrected by motion on notice under sec. 5 of ch. 134 of the Code. The statutory remedy however is cumulative and has not abolished petition for re-hearing or bills of review, which still may be had according to the course of equity in the same manner as before the enactment of the statute. *Id.*

6. Want of notice of the time and place of the taking of an account by a commissioner is not sufficient reason for a bill of review or petition for re-hearing, such objection not having been taken, as it ought to have been, before the decree was rendered. *Id.* 564.

7. Where a bill of review or petition for re-hearing is dismissed in the circuit court, and an appeal is taken, this Court may correct the error complained of without sending the cause back to allow the bill of review or petition to be heard. *Id.*

8. Where a commissioner's report shows, that interest on a debt audited therein is calculated at six *per cent.*, and the pleadings in the the cause show, that the debt bore nine *per cent.* interest, and the report is not excepted to, such error may be corrected in the court below on notice under the statute or by bill of review by petition for re-hearing in a proper case or upon appeal in the Appellate Court. *Id.*

9. Where questions purely of fact are referred to a commissioner to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight and should be sustained, unless it plainly appears that they are not warranted by any reasonable view of the evidence. This rule operates with peculiar force in an appellate court, when the findings of the commissioner have been approved and sustained by the decree of the inferior court. *Handy* v. *Scott*, 710.

10. Items or matters excepted to in the report of a commissioner, which is recommitted by the court, will not be open to judicial investigation in acting upon the report made upon such recommitment, unless such items or matters are excepted to in the latter report. *Carskadon* v. *Minke*, 729.

See *Judicial Sale*, 4, 5; *Vendor's Lien*, 5–7.

COMMITTEE.

1. It is true, that delay in the assertion of a right, unless satisfactorily explained, may operate in equity as a waiver of such right and that *laches* and neglect are always discountenanced by a court of equity. But these principles are inapplicable, when the party, who, it is claimed, has failed to assert his right in a reasonable time, was an infant or one *non compos mentis*, and the suit is brought promptly, after there is some one appointed, upon whom the law imposes the obligation to guard the interest of such infant or lunatic. *Knight* v. *Watts*, 176.

2. Without determining upon what principles the accounts of a committee of a lunatic or idiot should generally be settled, yet it is held that under the circumstances of this case stated in the opinion the accounts of such committee ought to be settled on the principles governing the settlement of a guardian's account. *Id.* 177.

COMPENSATION. See *Condemnation of Land*, 1.

CONDEMNATION OF LAND.

1. As a general rule the compensation to the owner for land taken for public purposes is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the near future. *Railroad Co.* v. *Shepherd*, 672.

2. In estimating the value of the residue of a tract, a part of which has been taken for public purposes, the commissioners or jury should consider only such damage, as is peculiar to that particular tract, and not that which it suffers in common with all other tracts in the neighborhood The damage to be estimated is that which directly or proximately results from the taking or use of the land for the purpose, for which it was taken, but should not include such damage as arises from the fact, that the use of the land taken for the purposes, for which it was taken, would injuriously affect any business carried on upon such tract of land by increasing competition or in any like manner. Such injury is not an injury to the land but to the business, which is or may be transacted upon the land. *Id.*

CONFEDERATE STATES BONDS. See *Trusts and Trustees*, 4–6.

CONFEDERATE STATES MONEY.

A tract of land was sold on December 15, 1862, in Mercer county with reference to Confederate States treasury-notes, as a standard of value, for the price of $1,000.00 of which $500.00 was in hand paid and a bond for $500.00 payable twelve months thereafter given for the residue. In a suit in equity brought by the assignee of

CONFEDERATE STATES MONEY—*Continued.*

the vendor, to enforce the vendor's lien against the land for the amount of the bond of $500.00 given for the unpaid purchase-money, HELD:

I. That the amount of unpaid purchase-money specified in the $500.00 bond must be reduced to its value in gold, as of the date of said bond. *Bailey* v. *Stroud*, 614.

II. That the true value of such Confederate States notes was neither the actual value in gold of the property sold at the time of the sale thereof nor the actual value in gold of the Confederate "dollars" specified in said $500.00 bond, nor the price at which gold was selling in Confederate States treasury-notes in Richmond or elsewhere in the Confederate States than in said county of Mercer. *Id.*, 615.

III. That the true value of such notes should be ascertained and measured by the average purchasing power of gold in Mercer county of all kinds of property, real and personal, just before the civil war commenced, compared with the average purchasing power of such Confederate States treasury-notes in said county at the date of said bond. *Id.*

IV. That it was error to assume that the true value of the unpaid purchase-money was the actual value of the land in "good money" at the date of the sale thereof less the amount of the down payment of $500.00, *Id.*

V. That the cause should have been referred to a commissioner to ascertain the true value of the unpaid purchase-money as of the date of December 15, 1862, according to the principles here laid down, and to those established by this Court in *Bierne* v. *Brown's Administrator, &c.*, in 10 W. Va. 748. *Id.*

CONSIDERATION. See *Trusts and Trustees*, 8.

CONSTITUTIONAL LAW. See *New Trial*, 4; *Exception*, 3; *Taxes*, 3.

CONSTRUCTION OF AGREEMENTS, CONTRACTS, &c. See *Agreement*, 1.

CONSTRUCTION OF STATUTES. See *Habeas Corpus*, 6; *Pl. & Pr.*, 2, 3; *Repeal*, 2; *Administrators*, 1; *Indictment*, 6, 8, 9, 16, 24; *Elections*, 2; *Attachment*, 3, 6; *New Trial*, 4; *Demurrer*, 1; *Cider*, 1, 2; *Judicial Sale*, 4; *County Commissioners*, 2; *Usury*, 1; *Appeal*, 1, 5, 6; *Injunction*, 10; *Commissioner*, 5; *Justice of the Peace*, 1; *Vendor's Lien*, 1; *Parties*, 3; *Partners, &c.*, 2.

CONTRACT.

Where a contract was made for the purchase of a tract of land and the consideration was $800.00, and the vendor agreed to take

CONTRACT—*Continued.*

as a part of the consideration a lot at $75.00, the title to which was in the infant-daughter of the vendee, and all the purchase-money has been paid except the lot, to which the grantee had no title, in a suit to enforce a lien against the land as the property of the vendee the court did not err in requiring the price of the lot, to-wit, $75.00, to be paid to the vendor instead of such lot. *Beall* v. *Walker*, 742.

See *Agreement*; *Survey*, 1; *Specific Performance; Abatement*, 2; *Trover*, 3-6.

CONVERSION. See *Trover*, 1, 2.

CONVEYANCE. See *Trusts and Trustees*, 8.

CO-PARCENER. See *Widow*, 1.

CORPORATIONS.

1. A corporation must defend a suit against it in its corporate name; and the stockholders will not be permitted to defend, unless the corporation refuse to do so. *Park* v. *Oil Co.*, 486.

2. Where a suit is brought against a corporation, and a purchaser of the stock of the corporation files his answer in defence of the suit without showing that the corporation has refused to defend the suit, it is not error to strike out his answer. *Id.*

CORPUS DELICTI.

1. It is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the *corpus delicti* either by direct evidence or by cogent and irresistible grounds of presumption. *State* v. *Flanagan*, 117.

2. On the trial of an indictment for homicide, although the body has been found, yet the *corpus delicti* can not be said to be proved, until it be established by full proof, that such death has not been caused by natural causes or accident. *Id.*

3. On the trial of such indictment when the remains of the alleged deceased have been found wholly or partly consumed by fire, it is necessary to establish by full proof, that the remains so found are the remains of the deceased, and this proof is a necessary part of the *corpus delicti*. *Id.*

4. On a trial for a homicide, where the evidence is insufficient to establish the *corpus delicti*, there is no sufficient proof that a legal crime has been committed, and therefore no person can be legally guilty of the commission of it. *Id.*

COSTS. See *Disclaimer*, 1.

COUNTY COMMISSIONERS. See *Elections*, 1, 2.

COUNTY COURT. See *Repeal*, 2; *Roads*, 1, 2.

COURT OF APPEALS. See *Commissioner*, 1; *Jurisdiction*, 1; *Bill of Exceptions*, 1.

COURT OF EQUITY. See *Demurrer*, 1, 2; *Jurisdiction*, 2–4, 7; *Trusts and Trustees*, 8; *Trespass*, 1, 2; *Vendor's Lien*, 2; *Title*, 1.

COVENANT. See *Parties*, 3.

CREDITOR'S BILL. See *Widow*, 2.

CRIMINAL PLEADING AND PRACTICE. See *Habeas Corpus*, 1-6; *Indictment; Exception*, 1-6; *Evidence*, 3-10; *Corpus Delicti*, 1-4.

CRUELTY TO ANIMALS. See *Indictment*, 16-23.

DAMAGES. See *Condemnation*, 2; *Trespass*, 7-11; *Acknowledgment*, 1, 2.

DAMNUM ABSQUE INJURIA. See *Condemnation*, 2.

DEBTOR AND CREDITOR. See *Vendor's Lien*, 2, 3.

DECLARATION.

1. A declaration in ejectment, which describes the premises as "a certain lot of land lying in the town of Ronceverte in the county aforesaid, being the piece of land near the railroad depot in said town, upon which the defendant has erected a pump-house and appliances for the purpose of supplying its engines with water," describes the premises with such convenient certainty as to make it good on demurrer. *Carter* v. *Railway Co.*, 644.

DECREE. See *Commissioner*, 1; *Demurrer*, 1; *Pl. & Pr.*, 6; *Res Judicata*, 1, 2; *Vendor's Lien*, 9; *Reversal of Decrees*, 1.

DEED.

1. If it is claimed, that a deed conveying a tract of land in consideration of a debt due from the grantor to the grantee was though absolute in its form a mortgage on this tract of land to secure this debt; the circumstance, that this debt was already secured by a deed of trust executed by the grantor to a trustee conveying this identical tract of land to secure this debt and nothing else, is a circumstance so strongly indicating, that the transaction was, what it puported to be, a sale of the land and an absolute conveyance of it and not a mortgage to secure this debt, that it would take very strong parol evidence and strong circumstances to justify a court in regarding it as a mortgage; and in such a case as this the circumstance, that the grantor was hard pressed for money, and the grantee was a known money-lender, or that this

DEED—*Continued.*

debt (the price paid for the land) was considerably less than the value of the tract of land, and that the possession of the land remained with the grantor for several months after without any rent paid therefor or any even professedly reserved, would be entitled to but little weight to show, that this deed absolute on its face was a mortgage, as against the circumstance, that the parties could not have thought of the transaction as the giving of a lien or mortgage on this tract of land for this debt, as a lien on this land to secure this debt already existing. *Matheney* v. *Sandford*, 386.

2. There is no doubt, that when an individual having title to lands lying on both sides of a water-course not navigable grants lands lying on one side thereof and bounded thereby, the grantee gets by such grant a moiety of the bed of the water-course, unless the grant clearly excludes such construction of it. *Carter* v. *Railway Co.*, 644.

3. But, where a grantor having title to lands lying on both sides of a head race of a mill owned by him below the land, which he grants, conveys to a grantee by a deed lands on the opposite sides of this mill-race bounded by it, the tracts on each side of the mill-race being described by metes and bounds extending around the whole of each tract separately and not extending around both of them together as one tract, the grantee gets no part of the bed of such mill-race. *Id.*, 645.

4. When a deed calls for a corner, which stands on the top of the bank of a stream not navigable, and these courses are up the line of said stream though trees be marked or stakes planted along the top of the bank of such stream, the boundary of the tract would be the same, as if the deed had called for the water-edge of the stream at low-water mark as the boundary. *Id.*

5. But if in such a deed as above described there be substituted instead of a stream not navigable the head race of a mill owned by the grantor on this race below the land granted, the boundary of the tract granted would be the top of the bank of the mill-race along the line, on which trees have been marked or stakes planted and not the water edge of the mill-race at low-water mark. *Id.*

See *Ex'rs & Adm'rs*, 1; *Abatement*, 2; *Taxes*, 2; *Recordation*, 1–7; *Acknowledgment*, 1, 2.

DEED OF TRUST. See *Trusts and Trustees; Tax Sale*, 2–4.

DELINQUENT LAND. See *Taxes*, 2, 3.

DELIVERY. See *Trover*, 4–6.

DEMURRER.

1. A court of equity under the provisions of ch. 71, § 30, of Acts of 1882, (ch. 125, § 30 of Code,) when it overrules a demurrer, can not enter a decree on the merits of the case set out in the bill, but it should give a rule upon the defendant to answer the bill in a specified time, and if the defendant fails to answer the bill on the day specified in the order, the court may then and not till then enter a decree upon the merits of the case as stated in the bill. And though, when the demurrer is overruled, a rule be given to answer the bill but no day be specified in the order, the court can not enter a decree on the merits of the cause at a subsequent day of the term, if no answer be filed. *Moore* v. *Smith*, 379.

2. This rule so required need not be served on the defendant, who is in court by having filed a demurrer, and therefore the rule is the equivalent of an order granting the defendant leave to file his answer before a specified day, and this is the form, in which the order is usually and properly entered. *Id.* 380.

See *Habeas Corpus*, 2; *Indictment*, 10; *Jurisdiction*, 2; *Specific Performance*, 1; *Res Judicata*, 2; *Jurisdiction*, 6; *Retraxit*, 1; *Demurrer*.

DEMURRER TO EVIDENCE.

1. The practice of inserting in a demurrer to evidence the evidence on both sides is proper. *Garrett* v. *Ramsey*, 345.

2. In such case the demurrant must be considered as admitting all that can reasonably be inferred by a jury from the evidence given by the other party, and as waiving all the evidence on his own part, which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. *Id.*

3. The evidence on a demurrer to the evidence should be interpreted most benignly in favor of the demurree; so that he should have all the benefit, which might have resulted from the decision of the case by a jury, the proper forum, from which the decision has been withdrawn by the demurrant. *Id.*

4. The rule for determining what facts shall be considered as established in cases of demurrer to the evidence, when all of it is adduced by the demurree is, the court shall regard the demurrant as necessarily admitting by his demurrer not only the credit and truth of all the evidence but all inference of fact that may be fairly deduced from it; and in determining the facts inferable from the evidence, inferences most favorable to the demurree will be made in cases where there is grave doubt which of two or more inferences shall be drawn. Unless there is a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to to made in his favor. *Heard* v. *Railroad Co.* 455.

DEMURRER TO EVIDENCE—*Continued.*

5. If the evidence is such, that the court ought not to set aside the verdict of a jury in favor of the demurree, then upon a demurrer to that evidence the court should give judgment against the demurrant. *Id.*

6. A case in which the judgment of the circuit court sustaining the defendant's demurrer to the plaintiff's evidence in an action for negligently killing the plaintiff's mule by the train of the defendant, is reversed by this Court and judgment given for the pla in tiff for the damages found by the jury. *Id.*

See *Exception*, 2.

DESCRIPTION OF LAND. See *Declaration*, 1.

DISCHARGE. See *Habeas Corpus*, 2, 4–6.

DISCLAIMER.

In a real action, if the defendants plead not guilty, they may afterwards abandon their defence and by leave of the court withdraw the plea of not guilty and put in a plea of disclaimer, or they may disclaim by a simple entry of record in the case, all interest in or title to the land in controversy. But if only one of the defendants wishes to abandon the controversy, the court should not permit the withdrawal of the plea of not guilty, but the defendand desiring to abandon the controversy should be allowed to do so by such simple entry of disclaimer on the record-book; and there should be no judgment for costs subsequently incurred against him. *Fisher* v. *Camp*, 576.

DISCOVERY. See *Jurisdiction*, 4.

DISMISSION. See *Chy. Pl. & Pr.* 2; *Mechanic's Lien.*

DIVERSION OF WATER. See *Trespass*, 4, 5, 7–9.

DOG-TAX. See *Injunction*, 1-6.

DOWER. See *Widow*, 1, 2.

DRUGGISTS.

1. No druggist is authorized to carry on his business in this State without a State license therefore. *State* v. *Enoch*, 254.

2. The pharmacy act does not repeal the statute requiring a State license to carry on the business of a druggist. *Id.*

See *Indictment*, 14.

EJECTMENT.

1. Uninterrupped, honest and adverse possession for ten years in this State gives a right to recover land in an action of ejectment

EJECTMENT—*Continued.*

against the strongest proof of title, which independently of such continued adverse possession would be the better title. *Garrett* v. *Ramsey*, 345.

2. Where there are conflicting grants or deeds to lands causing an interlock, and the elder grantee or owner is in the actual possession of a part of his land outside of the interlock, and the junior grantee or adverse claimant is in the actual possession of a part of the interlock claiming the whole to the extent of his boundaries, such possession of the former outside of the interlock will not limit the possession of the latter to his mere enclosure, but he will be held to be in the adverse possession of all the land in the interlock.—*Green*, *Judge*, *dissenting* on this last point. *Id.*

See *Declaration*, 1.

ELECTIONS.

1. The writ of *certiorari* lies in this State from a circuit court or a judge thereof in vacation to the county court commissioners convened in special session to ascertain the result of an election, *Chenowith* v. *Commissioners*, 230.

2. The said county court commissioners, after they have opened the sealed packages of ballots returned by the district commissioners re-counted them upon the demand of opposing candidates for the same office and then again sealed up the ballots, can not under the provisions of sec. 21, ch. 155 Acts 1882 upon a subsequent demand of either of said candidates re-open the sealed packages and re-count the ballots a second time. *Id.*

ERROR. See *Commissioner*, 3-5, 8,

ESTOPPEL. See *Mortgage*, 3; *Res Judicata*, 1.

EVICTION.

1. Where there is a contract for a sale of several adjoining parcels of land in gross for an entire sum, and the vendor warrants the title generally, if the vendee is evicted from a portion of the land by reason of the want of title in the vendor, he may elect to hold so much of the land as he can and compel the vendor to abate the purchase-money or compensate him for the part of the land from which he has been evicted, even though the parties were mutually mistaken as to the title of the vendor to the part so lost by eviction. *Butcher* v. *Peterson*, 447.

2. In such sale, although the sale was in gross, and neither the quantity of land was specified nor any price fixed upon the separate interest or parcels, a court of equity will by reference to a commissioner or otherwise ascertain the relative value of the portion lost by the purchaser and decree its payment by the vendor. *Id.*

EVICTION—*Continued.*

3. The measure of compensation for the land lost in such cases, where the vendor acted in good faith and believed he had the right to sell the land, is such portion of the purchase-price as the relative value of the land lost bears to the purchase-price of the whole land. *Id.*

EVIDENCE.

1. A case reversed because the facts proved are plainly insufficient to warrant the judgment; the defendant having been indicted for *selling* spirituous liquors, &c., and the proof showing that he was a *purchaser* not a seller. *State* v. *Miller*, 107.

2. Upon review of a case tried by the court in lieu of a jury, if the evidence was plainly insufficeint to warrant the judgment, the Appellate Court will reverse the judgment and render judgment for defendant. *Id.*

3. To authorize the reversal of a judgment, for the reason that irrelevant evidence has been admitted, the evidence must not only be irrelevant, but it must be of such a nature, that its admission may have prejudiced the prisoner. *State* v. *Kinney*, 141.

4. When one is charged with crime, anything he says or does voluntarily, which can have any bearing towards showing his guilt, is competent to go to the jury for what it is worth, of which the jury alone can judge. *Id.*

5. Any written statement made by a witness, before he gives his evidence before the jury, which tends to contradict his evidence in any material point, is competent; and, if the court refuse to admit it, the judgment will be reversed, and a new trial granted. *Id.*

6. Before such written statement can go to the jury, it must first be shown to the witness, who made it, to give him an opportunity to deny, that it is his, and to give him an opportunity to make any statement he may choose in reference to its execution, and how it was procured, and all the circumstances attending its execution. *Id.*

7. If he denies that he executed the paper, or claims, that it did not refer to the matter, on which he had given evidence, or that it was written at the dictation of the prisoner, then it is competent for the prisoner to contradict these statements and show how and for what the paper was written; and the whole matter, the writing and the evidence with reference to its execution, should go to the jury, if the paper in any view of the case tended to contradict the evidence of the witness. *Id.*

8. If a party be accused of crime and a conviction is sought upon

EVIDENCE—*Continued.*

evidence in whole or in part circumstantial, it is essential, that all the circumstances, from which the conclusion is to be drawn, and without which it could not be drawn, shall be established by full proof, and every circumstance essential to the conclusion must be proved in the same manner and to the same extent, as if the whole issue had rested upon the proof of each individual and essential circumstance. *State* v. *Flanagan*, 117.

9. All such essential facts and circumstances, when established by full proof, must be consistent with the hypothesis of the guilt of the accused and inconsistent with any other hypothesis; and it is essential, that all such facts and circumstances should be of a conclusive nature and tendency. *Id.*

10. If any of these essential circumstances be consistent with the hypothesis of the innocence of the accused, then that circumstance ought not to have any influence in establishing the main fact to be proved. *Id.*

11. Where evidence is introduced, which appears proper at the time, and the court admits it and refuses to exclude it on motion of counsel with the remark: "It will be excluded, if it hereafter appears that it is irrelevant," and the record shows, that it afterwards appeared that it was irrelevant, but no motion was afterwards made by counsel to exclude it, the objection to its admission is waived. *Hargreaves* v. *Kimberly*, 787.

See *Bill of Exceptions*, 1; *Corpus Delicti*, 1-4; *Indictment*, 13; *Demurrer to Evidence; Agreement*, 1; *Chy. Pl. & Pr.*, 1, 2; *Trespass*, 8, 9.

EXCEPTION.

1. While it is the usual practice, where a jury is waived, and the case submitted to the court in lieu of a jury, if the party, against whom the judgment is rendered, is dissatisfied therewith, to except to the judgment and have the court certify the facts proved, yet it is not necessary for the record to show, that the judgment was excepted to. It is sufficient, if the facts appear upon the record either by the certificate of the court or otherwise. *State* v. *Miller*, 106.

2. In such a case upon review in the appellate court the case will be regarded as on demurrer to evidence, and the plaintiff in error the demurrant. *Id.* 107.

3. Since the adoption of the constitutional amendment of 1880 there is no doubt, that in revenue cases the State has equal right with the defendant to exceptions in the court below and review on writ of error. *State* v. *Thompson*, 149.

EXCEPTION—*Continued.*

4. In a case tried by a jury, no matter how many exceptions are taken to rulings of the court during the trial, unless a motion is made in the trial-court to set aside the verdict, and that motion is overruled and an exception taken, or objection made to the overruling of such motion is noted on the record, all such errors will by the Appellate Court be deemed to have been waived. *Id.* 150.

5. Where exceptions to a part of an answer are sustained, and the defendant does not ask leave to amend his answer, it is not error to proceed to hear the case on the bill and so much of the answer as is not excepted to. *Chapman* v. *Railroad Co.*, 300.

6. Where an answer sets up a claim to the attached property, which with the accompanying exhibits clearly shows, that, at the time the attachment was levied, the defendant had no claim to such property, an exception to so much of the answer, as attempts to set up such defence, is properly sustained. *Id.*

See *Pl. & Pr.*, 1; *New Trial*, 2; *Removal of Causes*, 1; *Commissioner*, 2-4.

EXECUTION. See *Pl. & Pr.*, 3-5.

EXECUTORS AND ADMINISTRATORS.

1. If two executors authorized by the will of their testator to sell a tract of land sell it to one of the executors but convey it to a third party who immediately conveys it to the executor who was the real purchaser, such sale can be avoided at the option of any of the parties, who under the will had an interest in the proceeds of such sale, to the extent of the interest of such devisee so objecting. But such sale and deed is not absolutely void, and the right of any one of the devisees or of all of them may be lost by any facts or circumstances showing that he or they had expressly or impliedly approved such sale under circumstances, that would make such approval a waiver in a court of equity of the right to have such sale and deed set aside. *Knight* v. *Watts*, 175.

2. If a personal representative or other fiduciary fails to make an *ex parte* settlement of his fiduciary accounts once a year, it will be presumed, that such failure arose from the failure of such fiduciry "to furnish a commissioner with a statement of all the money, which he had received or had become chargeable with or had disbursed within six months after the end of the year," and unless this presumption is rebutted by satisfactory evidence, such fiduciary must forfeit his commissions and all other compensation for his services during the year, in which he failed to make such *ex parte* settlement. *Id.*

3. An administrator, or other fiduciary, has authority to submit to arbitration any suit or matter of controversy touching the estate

EXECUTORS AND ADMINISTRATORS—*Continued.*

or property of his intestate or beneficiary without having first obtained the permission of the circuit court to do so in the manner prescribed by sec. 5 of ch. 63. Acts 1882; and an award made pursuant to such submission will not be set aside merely because the submission was made by the fiduciary without a compliance with the directions of said statute. *Wamsley* v. *Wamsley*, 45.

EX MERO MOTU. See *New Trial*, 1.

FIDUCIARIES. See *Executors and Administrators; Trusts and Trustees.*

FORFEITURE OF TITLE. See *Taxes*, 1.

FRAUDS. See *Trusts and Trustees*, 8.

GRANTOR AND GRANTEE. See *Deed.*

GUARDIAN *AD LITEM.*

1. In no suit brought against infants to sell their real estate can a decree be entered by a court, unless a *guardian ad litem* has been appointed for them, and he has filed for them an answer. *Hull* v. *Hull*, 1.

2. If a decree be in such a suit entered by the court, ordering a sale of the lands of infants, before a *guardian ad litem* is appointed for them, and before he files an answer for them, and under such decree the lands of infants be sold, and the sale be confirmed by the court, any one of these infants may within six months, after he attains the age of twenty-one, appear in the suit, whether it be ended or not, and have these decrees reviewed and reversed, and on such a reversal of such decrees for this error the title of the purchaser of the land falls and the parties must by proper proceedings by the court be put in *statu quo*. *Id.*

HABEAS CORPUS.

1. In *habeas corpus* a judgment remanding the prisoner can not be superseded. *Ex Parte Mooney*, 32.

2. Upon proceedings in *habeas corpus*, if the petitioner deems the return insufficient, he should not demur to it but move the court to discharge him. *Id.*, 36.

3. Jurisdiction in proceedings on *habeas corpus* in cases, where the detention is by commitment under legal process, is not strictly speaking a power of revision but a power to arrest a void order or judgment. It acts *directly* on the effect of the order or judgment but only *collaterally* on the order or judgment itself It can not, therefore, be made a substitute for a writ of error or *certiorari*. *Id.*

HABEAS CORPUS—Continued.

4. When a party is imprisoned under a judgment or order of a court having jurisdiction to make such order, he can not be discharged on *habeas corpus*, however erroneous such judgment or order may be; but it is otherwise if the court had no jurisdiction to make the order or judgment. *Id.*, 37.

5. Where a court has jurisdiction of the subject-matter and of the person, and it pronounces a severable judgment or sentence one part of which is authorized by law and another distinct part is not so authorized, the prisoner will not be discharged on *habeas corpus*, when it does not appear that he has undergone the full punishment imposed by the legal portion of the sentence. *Id.*

6. Under the provisions of sec. 9 of ch. 118 of Acts of 1882, the court sentenced a party, found guilty of unlawfully wounding with intent to maim, disfigure, disable and kill, to confinement in the penitentiary for one year and to pay a fine of $100.00, HELD:

   Such a party is not entitled to be discharged on *habeas corpus*. *Id.*

HEIR. See *Parties*, 1.

HOMICIDE. See *Corpus Delicti*, 2–4.

IDIOTS. See *Committee*, 1, 2.

IMBECILE. See *Trusts and Trustees*, 6.

INDICTMENT.

An indictment alleges, that C. B. unlawfully furnished one A. R. for the use of P. E. money to unlawfully induce P. E. to absent himself from the circuit court of the county at a certain term, to which he, P. E, had been summoned as a witness against said C. B. in a trial on an indictment against said C. B. then pending in said court, whereby the said C. B. attempted to obstruct and impede the administration of justice. HELD:

   This indictment was fatally defective in not alleging, that A. R. paid or offered to pay said money to the witness P. E. to induce him to absent himself as such witness at said time from the circuit court. Without this the act done by the defendant is not of such a nature as to constitute an attempt to commit the offence mentioned in the indictment; and therefore on motion of the defendant the court ought to have quashed this indictment. *State* v. *Baller*, 90.

2. An indictment may be fatally defective as an indictment for robbery yet good for an assault. *State* v. *Howes*, 110.

3. If such indictment attempts to charge the offence of robbery and is bad for that offence and charges an assault, it is good for the lesser offence, and a motion to quash such indictment is properly overruled. *Id.*

INDICTMENT—*Continued.*

4. Mere surplusage in an indictment will not vitiate it; and therefore where an indictment alleges facts, which constitute a misdemeanor, it will be good for that offence, although it states other facts, which go to constitute a felony, but falls short of stating sufficient facts to constitute that crime. *Id.*, 111.

5. If an indictment for a misdemeanor barred in one year charges, that the offence was committed on the — day of —1881, and the indictment was found in that year, it is good. *State* v. *Thompson*, 149.

6. An indictment for murder in the form prescribed by sec. 1 of ch. 118 of the Acts of the Legislature of 1882 is a valid indictment. *State* v. *Flanagan*, 116.

7. The general rule is, that each count in an indictment must be sufficient in itself to make a complete indictment; and averments in one count can not aid defects in another. To some extent repetitions may be avoided by referring from one count to another; but the reference must be so full and distinct as in effect to incorporate the matter going before with that in the count in which it is made. *State* v. *Bruce*, 153.

8. Our statute—sec. 10, ch. 158, Code—providing that no indictment shall be quashed or deemed invalid for omitting to state the time at which the offence was committed, when time is not of the essence of the offence, does not make valid an indictment which fails to aver any date, or that the offence charged was committed at a time within the statutory bar, when the offence is one which the statute declares shall not be prosecuted after a prescribed limitation. *Id.*

9. Sec. 21 of ch. 158 of the Code, which declares "no exception shall be allowed for any defect or want of form in any presentment or indictment founded on any provision of ch. 32 or 151," &c., is intended merely, to exclude defences which do not put in issue the truth of the charges averred in the indictment; and it does exclude exceptions to an indictment which avers facts that may be true and still not necessarily show the accused to be guilty of subsisting offence. *Id.* 154.

10. An indictment for selling spirituous liquors, which fails to aver the date of the sale or that the sale was made within one year from the time the indictment was found by the grand jury, is fatally defective and will be held bad on demurrer. *Id.*

11. An indictment, which charges an offence in the language of the statute, will not be held bad because it contains surplus matter. *State* v. *Hall*, 236.

INDICTMENT—*Continued.*

12. In an indictment for robbery "silver coin of the value of $2.00" is a sufficient description of the property taken. *State* v. *Jackson*, 250.

13. Upon the trial of such an indictment it is proper to permit the party, from whom the coin was taken, to give evidence as to the number and value of the pieces taken. *Id.*

14. The allegation in the indictment, that the defendant "carried on the business of a druggist without a license therefor," using as it does the language of the statute, is sufficient. *State* v. *Enoch*, 253.

15. The statute requiring the name of the witness, on whose evidence the indictment was found, to be stated at the foot of the indictment is directory, and the omission to so state the name is not fatal to the indictment. *Id.*

16. The first part of sec. 1, ch. 74 of Acts of 1875, which provides, "that if any person shall over-drive, torture, torment, deprive of necessary sustenance, or unnecessarily, or cruelly beat, or needlessly mutilate, or kill any domestic animal, * * * every such offender shall for every such offence be deemed guilty of a misdemeanor," creates seven separate and distinct offences of a similar character. *State* v. *Gould*, 258.

17. No two of these several and distinct offences can be united in one count of an indictment without rendering it fatally defective. *Id.*

18. But the adding in any one count for over-driving, over-loading or depriving of necessary sustenance or unnecessarily or cruelly beating or needlessly mutilating or killing, the words "and torture and torment" or either of them, would not cause such count to be fatally defective as including a charge of more than one offence in a single count, the added words "torture and torment" would be mere surplusage. *Id.*

19. It is sufficient in describing in an indictment any five of these offences to use the words of the statute "over-drive, over-load deprive of necessary sustenance, unnecessarily and cruelly beat, or needlessly mutilate and kill," as the case may be, without adding the circumstances or manner, in which the act was done. *Id.*

20. But this would not be sufficient in describing the other two offences, torturing or tormenting, but the circumstances and the manner of the torturing or tormenting, as the case may be, must be stated, as for instance, "killing a domestic animal known as a mule by breaking its hind leg by shooting it with a ball fired from a pistol held in the hand of the accused." *Id.* 259.

INDICTMENT—*Continued.*

21. Neither the ownership nor value of the domestic animal need be stated in an indictment under this statute. *Id.*

22. An indictment under this statute in the following form is sufficient: "The grand jurors of the State of West Virginia in and for the body of the county of Wood, and now attending said court upon their oaths present, that Stephen Gould on October 13, A. D. 1881, in the said county, did unlawfully and wilfully and cruelly beat, shoot, torture, and otherwise ill-treat a certain beast called a mule, the owner or owners of which said mule is to the grand jurors unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." In such an indictment the words, "shoot, torture and otherwise ill-treat" and the words "the owner or owners of which said mule is to the grand jurors unknown," are mere surplusage. *Id.*

23. In such an indictment it was unnecessary to allege, that the mule was a domestic animal, as the court will take judicial notice, that all mules in this State are domestic animals. *Id.*

24. An indictment under sec. 7, ch. 149 of Code, which avers, that the defendant did lewdly and lasciviously associate and co-habit with one S. F., the defendant and said S. F. not being then married to each other, is fatally defective, because it fails to aver that said parties so associated and co-habited *together* or with each other. *State* v. *Foster*, 272.

25. The principles and decision announced in *State* v. *Foster*, 21 W. Va. 767, approved and re-affirmed. *Id.*

INFANT. See *Guardian ad Litem*, 1, 2; *Widow*, 1; *Committee*, 1.

INJUNCTION.

1. A bill of injunction in equity will not lie to restrain the collection of a tax laid by a county court for county-purposes, on the sole ground that the assessment of the tax is illegal. There must exist in addition circumstances bringing the case as presented by the bill under some recognized head of equity such as the preventing of a multiplicity of suits. *Williams* v. *County Court*, 488.

2. But if one or more tax-payers of the county on behalf of himself or themselves and all other tax-payers of the county subject to the illegal tax complained of file their bill of injunction to prevent the collection of such tax, it will lie, on the ground that such injunction will avoid a multiplicity of suits. *Id.*

3. But there must be an averment in such bill, that it is filed by the plaintiff or plaintiffs on behalf of himself or themselves and of all other tax-payers subject to the illegal tax. Such an aver-

INJUNCTION—*Continued.*

ment is absolutely essential to give a court of equity jurisdiction on the ground of avoiding a multiplicity of suits. *Id.*

4. If such averment is not made the bill is fatally defective on demurrer, when the avoiding of a multiplicity of suits is the only ground for equitable interference on the face of the bill; but if such averment is omitted, the court will not dismiss the bill absolutely in every case but will give the plaintiffs leave to amend the bill by the insertion of such averment, provided the so doing does not alter the character and objects of the suit so as to make it essentially a new suit. *Id.*

5. In such suit all the plaintiffs and all those, on whose behalf it is brought, must have a common cause of action and represent a single and entire claim or interest. The grievance complained of must be the same as to all, so that there could not be on the facts stated in the bill a decree dismissing the bill as to some and sustaining it as to others, should some of the facts alleged be proven and others not proven. If this common cause is not stated in the bill, it should be dismissed on demurrer. *Id.* 489.

6. If a dog-tax be assessed by a county court under the 23d chapter of the Acts of 1881, and a bill be filed by several owners of dogs in a particular district in the county for themselves and all other owners of dogs in that particular district to enjoin the collection of such dog-tax in said district then in the hands of a constable of such district for collection, in which the county court of the county, the sheriff of the county, to whom under the law the tax is to be paid over, and the constable of the district, whose duty it is to collect the tax, are made defendants, such bill ought to be dismissed on demurrer, even though this act of the legislature is unconstitutional and the tax illegal, because there are neither proper parties to such bill, plaintiffs or defendant, nor is the object of such bill one, which ought to be granted; the injury, if this dog-tax be illegal, is common to all the owners of dogs in the county; and if these plaintiffs had filed a bill on behalf of themselves and all other owners of dogs in the county subject to this tax, they might sustain their suit to enjoin the collection of any part of such illegal tax in any part of the county. But the bill as filed was so essentially different from the bill, which should have been filed, that on sustaining a demurrer to such bill the court ought not to allow it to be amended and converted into the bill, which it is stated above, could be sustained, for this should be regarded as a distinct suit and not as an amendment to the original bill. *Id.*

See *Trespass*, 1, 2.

INSTRUCTIONS. See *Trespass*, 6, 7.

INTEREST. See *Usury*, 1-3; *Commissioner*, 8.

INTERLOCK. See *Ejectment*, 2.

INTERLOCUTORY ORDER. See *Appeal*, 5, 8; *Writ of Error*, 2.

JOINT TENANT. See *Widow*, 1.

JUDGMENT. See *Habeas Corpus*, 1, 4; *Evidence*, 3; *Res Judicata*, 1, 2; *Statute of Limitations*, 4, 5; *New Trial*, 8; *Retraxit*, 1; *Pl. & Pr.*, 3-5.

JUDGMENT-LIEN. See *Vendor's Lien*, 2, 3.

JUDICIAL NOTICE. See *Indictment*, 23.

JUDICIAL SALE.

1. In a suit to sell the remainder of certain real estate for the payment of debts against it, in which the owner of the life-estate consents that the whole property may be sold together and a gross sum paid to him in lieu of his life-estate from the proceeds of the sale, the court, if it is satisfied the remainder will bring a better price by selling the whole property together, may order the sale so to be made without the consent of the owner of the remainder. *Cranmer* v. *McSwords*, 412.

2. Where a decree is made for the payment of money, whether it is a personal degree against the debtor or merely against property liable for the payment of the money so decreed to be paid, the decree should be entered for the aggregate of principal and interest at the date of the decree, with interest thereon from that date. *Id.*, 413.

3. Under sec. 1 of ch. 132 of the Code a sale can not be set aside merely because the commissioners failed to give bond before making it. *Sommerville* v. *Sommerville*, 479.

4. It is generally erroneous to decree sale of land, in which a widow is entitled to dower, to pay liens or debts against it without first assigning the widow her dower thereon. *Sommerville* v. *Sommerville*, 484.

5. The same person can not occupy the antagonistic positions of seller and purchaser of the same subject; and, therefore, if a commissioner selling land under a decree of court becomes himself the purchaser, or has any understanding at the time of the sale, that he is to be interested in the purchase, the sale will be held void at the election of any party interested in the land. *Ayers* v. *Blair*, 559.

See *Guardian ad Litem*, 1, 2; *Widow*, 1, 2; *Taxes*, 1; *Mortgage*, 1-3; *Attachment*, 5; *Pl. & Pr.*, 5; *Parties*, 1,2; *Jurisdiction*, 5; *Partners and Partnership*,1, (IV); *Appeal*, 8; *Title*, 2, 3.

JURISDICTION.

1. To give this Court jurisdiction in a cause involving matters simply pecuniary, the record must show not only that the party complaining has been prejudiced by the decree or judgment of the inferior court, but also that the amount in controversy in this Court exceeds the value of $100.00 exclusive of costs. *Love* v. *Pickens*, 341.

2. A court of equity has jurisdiction to enforce a vendor's lien on land for the purchase-money represented by a bond, though the bond has been lost, and though a copy of the deed can not be produced by the vendor, the plaintiff; and a bill properly alleging these facts should be sustained on demurrer, though there is with the bill no affidavit that the bond has been lost and could not be found on search, as these facts may be shown by proof or otherwise during the progress of the trial. *Moore* v. *Smith*, 379.

3. No precise rule can be laid down defining the extent and limits of the concurrent jurisdiction, which courts of equity will exercise with courts of law in matters of account. In such matters courts of equity reserve to themselves a large discretion, in the exercise of which they will pay due regard to the nature of the case and the situation and conduct of the parties. *Grafton* v. *Reed*, 437.

4. If the averments of the bill show that the specific accounts can be fairly determined in a court of law, and that no discovery is necessary, the simple fact that the bill contains vague and general statements as to the inadequacy of the remedy in a court of law, or the necessity for some discovery from the defendant, without stating the specific facts showing that there is such inadequacy in the remedy at law or necessity for a discovery, such statements will be considered merely as pretexts for foisting a jurisdiction upon courts of equity, which does not belong to them, and they will be disregarded and jurisdiction declined. Such, in the view of the Appellate Court, is the character of the jurisdictional averments of the plaintiff's bill in this cause. *Id.*

5. Land of greater value than $100.00 is sold by a special commissioner for less than $100.00, the former owner files his bill to set aside said sale and recover the land, the circuit court dismisses his bill. HELD:

   The matter in controversy is the land and not the price for which it sold, and that being of greater value than $100.00, this Court has jurisdiction to review said decree. *Ayers* v. *Blair*, 558.

6. If the court has no jurisdiction, it will dismiss a bill on the hearing, although there was no demurrer to the bill. *Cresap* v. *Kemble*, 603.

JURISDICTION—*Continued.*

7. A court of equity has no jurisdiction to settle the title and boundaries of land, when the plaintiff has no equity against the party, who is holding the land. *Id.*

See *Habeas Corpus*, 3–5; *Injunction*, 3; *Abatement*, 1; *Bankruptcy*, 2–4, 6, 7.

JURORS. See *Verdict*, 1; *Attachment*, 6; *New Trial*, 6; *Evidence*, 4–7.

JUSTICE OF THE PEACE.

Under ch. 8 of Acts of 1881 the pleadings in a civil action before a justice may be oral or in writing, and if oral there should be entered on the justice's docket a brief statement of the contents of such pleadings (§50 and §179); and if an appeal is taken, new or amended pleadings in writing may, if substantial justice requires it, be filed in the circuit court or the case may be tried on the pleadings before the justice or, when oral, on the brief note of their contents on the justice's docket. But whether written pleadings be filed before the justice or in the circuit court, they need not be of any particular form but must be such as to enable a person of common understanding to know what was intended. *Poole* v. *Dilworth*, 583.

LACHES. See *Committee*, 1.

LICENSE. See *Cider*, 1, 2.

LIENS. See *Attachment* 3; *Vendor's Lien*, 1–7.

LIFE-ESTATE. See *Judicial Sale*, 1.

LIS PENDENS. See *Attachment*, 4; *Title*, 2.

LOST PAPERS. See *Jurisdiction*, 2.

LUNATIC. See *Committee*, 1.

MARRIED WOMEN. See *Acknowledgment.*

MEASURE OF COMPENSATION. See *Eviction*, 3.

MECHANIC'S LIEN.

In a suit to enforce a mechanic's lien, if it appears upon the face of the bill that the suit was not brought within six months from the time plaintiff filed his account with the clerk, as required by the statute, the bill should be dismissed upon demurrer thereto. *Phillips* v. *Roberts*, 783.

METES AND BOUNDS. See *Deed*, 2–5.

MILL-RACE. See *Deed*, 2–5.

MISDEMEANOR. See *Verdict*, 2.

MORTGAGE.

1. Where real estate conveyed to a foreign railroad company is attached in this State for the debts of said company, and a defendant claims the property under deed, ordered to be made under proceedings in a foreign court to foreclose a mortgage on the "railroad," and the pleadings in said cause do not assert that the mortgage covers the said property in this State, the court without passing on that question orders the trustee to sell "all the right, title and interest of the railroad in West Virginia, which passed under said mortgage," and a deed was ordered to be made for such interest, the courts of this State without reference to any conflict of jurisdiction are left free to decide, whether any thing passed under said mortgage. *Chapman* v. *Railroad Co.*, 300.

2. When a mortgage was executed by a Pennsylvania railroad company authorized under its charter to build a road "from near Pittsburg, Pennsylvania, in the direction of Steubenville, Ohio, to the Pennsylvania State line;" and the said mortgage grants the whole of their railroad and other property "situated between and at the terminus of their railway at the city of Pittsburg and the boundary line of the State of Virginia in the counties of Alleghany and Washington in the State of Pennsylvania," it conveyed no property whatever in the State of Virginia. *Id.*

3. The attaching creditor in this State, who bid upon property at the sale under such mortgage in the State of Pennsylvania, is not estopped to insist upon his attachment-lien on the property in this State. *Id.*

See *Tax-Sale*, 2; *Deed*, 1; *Vendor's Lien*, 2.

MOTIONS. See *Exceptions* 4; *New Trial*, 1; *Evidence*, 11.

MULTIFARIOUSNESS. See *Vendor's Lien*, 8

MULTIPLICITY OF SUITS. See *Injunction*, 1-4.

MURDER. See *Indictment*, 6.

NATIONAL BANKS. See *Usury*, 1-3.

NEGOTIABLE INSTRUMENTS. See *Prom. Notes and Bills of Exchange.*

NEW TRIAL.

1. A new trial for errors committed during the former trial can only be had after motion made in the trial-court and overruled, as this Court will not *ex mero motu* grant a new trial. *State* v. *Hall*, 237.

2. If errors or supposed errors are committed by a court in its rulings during the trial of a case by a jury, the Appellate Court can not review these rulings, unless, first, they were objected to when made and the point saved and a bill of exceptions taken showing these rulings during the term of the court, and unless, second,

NEW TRIAL—*Continued.*

a new trial was asked of the court below and refused, and such refusal objected to in the court below, and this appears of record. If either of these essentials is omitted, the Appellate Court can not review the rulings. It can not review them, unless bills of exceptions were taken to them as above stated, and a new trial was asked and refused, though a bill of exceptions was regularly taken to such refusal, and in this bill of exceptions these rulings of the court during the trial are fully stated, and it appears, that they were erroneous, and that these erroneous rulings caused the jury to find the verdict, which they did find. Nor can the Appellate Court review such rulings by the judges during the trial in any case, though they were excepted to when made, and regular bills of exceptions were then taken, if no new trial was asked in the court below and refused, and such refusal objected to, and this be noted in the record. *Danks* v. *Rodeheaver*, 274.

3 *Core* v. *Marple*, 24 W. Va. 354, approved and also points 2 and 3, in the syllabus of *State for use, &c.* v. *Phares*, 24 W.Va.657-8. *Id*

4. Our statute, authorizing the State to obtain and prosecute writs of error in this Court from judgments of the circuit courts in revenue cases, is constitutional and valid. *State* v. *Cooper*, 338.

5. A new trial ought to be granted, on the ground that the verdict is contrary to the evidence or the facts proved, only in cases of plain deviation from right and justice, not in a doubtful case merely because the court, if it had been on the jury, would have given a different verdict. *Id.*

6. If in such case, the question depends upon the weight of testimony, or inferences and deductions from facts proven, the jury and not the court are exclusively and uncontrollably the judges. *Id.*

7. A case, in which the judgment of the circuit court setting aside the verdict of the jury and granting a new trial, is reversed, because the facts proved were, in themselves, equivocal and inconclusive and the verdict, necessarily, dependent upon inferences to be drawn from these facts. *Id.*

8. Where a case was tried and a verdict rendered, which was set aside by the court, and a new trial granted, and on the second trial the verdict was for the other party, and judgment rendered thereon, to which a writ of error has been obtained, the appellate court will look to the proceedings on both trials and, if the court below erred in setting aside the first verdict, will without considering the subsequent proceedings in the cause reverse the judgment and enter final judgment on the first verdict. *Johnson* v. *McClung*, 659.

See *Bill of Exceptions*, 1; *Verdict*, 1, 2; *Evidence*, 5.

NON COMPOS MENTIS. See *Committee*, 1.

NON-RESIDENT PARTIES. See *Appeal*, 7.

NONSUIT. See *Retraxit*, 1.

NOTICE. See *Trusts and Trustees*, 8; *Appeal*, 4; *Commissioner*, 6; *Vendor's Lien*, 2; *Recordation*, 3, 4, 6, 7; *Title*, 3.

NUISANCE. See *Trespass*, 10.

OBJECTION. See *Pl. & Pr.*, 1.

OFFICIAL BOND. See *Vendor's Lien*, 6, 7; *Judicial Sale*, 4.

ORDER. See *Appeal*, 5.

PAROL EVIDENCE. See *Trusts and Trustees*, 15.

PARTIES.

1. In a suit to subject lands descended to the heir to the payment of the debts of the ancestor the personal representative of the ancestor is a necessary party. *Sommerville* v. *Sommerville*, 484.

2. In enforcing a vendor's lien against the estate of a deceased vendee his personal representative is a necessary party to the suit; and the court ought to require the personal estate in the hands of the personal representative to be first ascertained and how much of it is applicable to the payment of the purchase-money due, and should require it to be applied before decreeing a sale of the land to pay the lien. *Sommerville* v. *Sommerville*, 479.

3. Sec. 2, of ch. 71 of the Code means, as if written as follows, including the words in parenthesis: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or (if a covenant or promise is made for the sole benefit of a person) with whom it is made jointly with others, such person may maintain in his own name any action thereon," &c. *Johnson* v. *McClung*, 659.

4. An appellate court will not reverse a decree at the instance of a party not prejudiced by it. *Handy* v. *Scott*, 710.

See *Judicial Sale*, 3; *Injunction*, 1-6; *Vendor's Lien*, 4, 8; *Bankruptcy*, 5.

PARTNERS AND PARTNERSHIP.

1. S. E. V. & B. in September, 1874, formed a partnership under the name of J. S. S. & Co. for the purpose of manufacturing plows, wagons, &c. All its capital was borrowed or purchased on the credit and in the name of said firm. The members of the firm with one other about six months afterwards were incorporated and organized as The West Fairmont Plow, Wagon and Manufacturing Company, for the purpose of carrying on the same

PARTNERS AND PARTNERSHIP—*Continued.*

business with a nominal capital of $2,150.00, consisting only of the patent right of a worthless plow owned by them in certain shares. Subsequently other parties became owners of certain shares of said stock, but under all these changes the said business was carried on exclusively in the name of J. S. S. & Co. From the time said firm was established until it was so incorporated, and thereafter until it ceased to transact business, all of its transactions, including debts incurred, and contracts and notes made by and with it, were incurred and made in the name of said firm. While it carried on said business many debts were incurred by it, which remained unpaid. The firm of J. S. S. & Co. being insolvent said E. S. and another member thereof fraudulently conveyed away large amounts of real estate to avoid the payment of said debts. In suits brought by creditors of the firm to set aside these fraudulent deeds and to charge the land so conveyed with payment of their debts, the defendant E. made defence, denying that any such partnership ever existed, or that he was or ever had been a member thereof; or that he was, or could be held liable as a partner in such firm, and claiming, that said corporation was alone liable for the payment of the plaintiffs' debts. HELD:

I. That the circumstances in proof in these causes clearly established the existence of a general partnership unlimited as to its duration between E. S V. & B. for the purpose of carrying on said business.

II. That even if no such partnership in the name of J. S. S. & Co. had ever in fact existed between said E. S. V. and B., or between them and others associated with them, yet under the circumstances in proof in these causes, they were liable as general partners to said several plaintiffs in the same manner and to the same extent, as if a general partnership for the purpose aforesaid had existed between them.

III. That this liability continued, notwithstanding the fact, that said E. S. V. and B. and K. had been incorporated and organized as a corporation for the purpose of carrying on the same business; and

IV. That the debts due to the several plaintiffs from the firm of J. S. S. & Co. having been established, and their priorities ascertained and declared, and said deeds as to the said debts set aside as fraudulent and void, the circuit court did not err in decreeing said lands to be sold to satisfy said debts without having first settled the accounts of said partners as between themselves and said partnership. *Bank* v. *Smith*, 541.

2. In a suit to settle the affairs of an unincorporated company or a partnership—one of the members being dead—the surviving

PARTNERS AND PARTNERSHIP—*Continued.*

members are not under the statute of 1882 competent to testify as witnesses in regard to such affairs. *Carskadon* v. *Minke*, 729.

3. In a suit by one partner against his co-partner for a settlement of the partnership-accounts the statute of limitations begins to run from the time there is a settlement or account stated of the partnership-business between the partners made several years after the dissolution of the firm, which they then believed and understood included and adjusted all the assets and liabilities of the firm, notwithstanding it may have been subsequently found, that there were then a few inconsiderable debts due from the firm still outstanding and unprovided for, which under the circumstances may be supposed to have been forgotten or omitted by inadvertance, and notwithstanding it may appear from such account stated, that there were then a large number of debts due to the firm which were by it apportioned among the partners according to their respective interests. *Boggs* v. *Johnson*, 821.

PENDENTE LITE. See *Lis Pendens.*

PERSONAL DECREE. See *Vendor's Lien*, 9.

PERSONAL REPRESENTATIVE. See *Parties*, 2; *Statute of Limitations*, 4, 5.

PHARMACY. See *Druggists*, 2.

PLEADING AND PRACTICE.

1. Where a plea or replication is allowed by the court and the record shows that the opposite party objected to the filing of the same, and that his objection was overruled, such party may have the question raised by such objection reviewed by the Appellate Court, although he did not except to the action of the court overruling such objection. *Bank* v. *Showacre*, 48.

2. A defendant files a plea under the provisions of sec. 5 of ch. 126 of the Code, and the plaintiff files a special replication thereto, in which he alleges facts which if true would entitle him to a verdict; the defendant rejoins generally; a trial is had on this issue and a verdict is found for the plaintiff. HELD:

That although said chapter of the Code provides, that every issue of fact upon such plea shall be upon a general replication, yet if the defendant could not have been prejudiced by the allowance of said special replication, this Court will not reverse the judgment on the ground that it was improperly allowed. *Id.*, 49.

3. The plaintiff in an execution may, by notice and motion under the provisions of sec. 35 of ch. 19, of the Acts of 1881, obtain judgment in the circuit court to which, or to the clerk's office of which, such execution is returnable against an officer, although

PLEADING AND PRACTICE—*Continued.*

such officer may reside in a county different from that for which said court is held. *Bank* v. *Horner*, 442.

4. In such proceeding the plaintiff may recover in any case, where the return of the officer on the execution shows, that the plaintiff would be entitled to recover from such officer money in any form of action. *Id.*

5. When the return shows that the officer had levied upon certain property and that no other property was found to levy upon, the plaintiff can only recover the value of the proverty so levied at the time it ought to have been sold by the mandate of the writ. *Id.*

6. A decree between co-defendants can only be based upon the pleadings and proofs between the complainant and defendants. *Titchenell* v. *Jackson*, 460.

7. The practice of making irrelevant and inconsiderate points and assignments of error and the repetition of the same point in various forms ought to be avoided as far as possible by counsel practicing in this Court. Such practice is condemned. *Carskadon* v. *Minke*, 729.

See *New Trial*, 1, 2; *Exception*, 1-4; *Prom. Notes and Bills of Exchange*, 1; *Writ of Error*, 1, 2; *Demurrer to Evidence*; *Parties*; *Specific Performance*, 1; *Disclaimer*; *Justice of the Peace*, 1; *Res Judicata*, 1, 2; *Declaration*, 1; *Retraxit*; *Appeal*, 7; *Trover*; *Trespass*, 3, 6, 11.

POSSESSION. See *Trover*, 1, 2.

PRINCIPAL AND AGENT. See *Trusts and Trustees*, 7.

PRINCIPAL AND SURETY.

1. Where a surety pays the debt of his principal, he is entitled to interest on the whole amount paid, principal and interest, from the date of such payment in an action or suit against his principal. *Cranmer* v. *McSwords*, 412.

2. Whether the surety, who has paid costs and expenses on account of the debt of his principal, can recover the same from his principal depends upon the circumstances of each case. Under the facts and circumstances of the case at bar it is held, that the surety is not entitled to recover from his principal the costs and expences of a suit to which the principal was not a party. *Id.*

3. Where real estate has been sold in a chancery cause, and a decree is entered therein directing that specific debts shall be paid by the commissioner having the fund in charge out of the proceeds of such sale, such decree is, as to the owner of the real estate so

PRINCIPAL AND SURETY—*Continued.*

sold, *prima facie* a satisfaction of such debts. If, therefore, said debts are paid by a surety, such decree directing payment from the proceeds of his property is sufficient, in the absence of countervailing evidence, to entitle him to recover the amount so paid or ordered to be paid from his principal. *Id.*

PRIVY EXAMINATION. See *Acknowledgment*, 1, 2.

PROMISE. See *Parties*, 3.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

A note is dated at a specified place, which is stated on its face, and is drawn in a form which makes it at such place a negotiable instrument. HELD:

The maker, when sued on such note by an innocent holder for value, will not be permitted to aver or prove such note was not in fact made at the place it purports on its face to have been made. *Bank* v. *Showacre*, 49.

PROOF. See *Trusts and Trustees*, 10–14.

PUBLICATION. See *Appeal*, 7.

PUBLIC ROADS. See *Roads.*

PURCHASE-MONEY. See *Jurisdiction*, 2; *Eviction*, 1; *Vendor's Lien.*

QUARE CLAUSUM FREGIT. See *Writ of Error*, 1.

RAILROADS. See *Attachment*, 4; *Mortgage*, 1–3.

RECEIVER. See *Trusts and Trustees*, 16.

RECITAL. See *Roads*, 2.

RECORD.

1. A paper purporting to be a bill of exceptions and copied into the record as such will not be regarded or treated by the appellate court as a part of the record, unless the record shows that it was, by some order or memorandum entered on the order-book of the trial-court made a part of the record. *Bank* v. *Showacre*, 49.

2. A paper purporting to be an answer copied into the transcript of the record and certified by the clerk as having been filed in the court below after the cause had been set for hearing, but which was not filed by any order of court and is not referred to or recognized in any order or decree entered in the cause, is not a part of the record and will not be considered by the appellate court. *Handy* v. *Scott*, 710

See *Exception*, 1, 4; *Jurisdiction*, 1.

RECORDATION.

1. If a deed of trust, the execution of which has not been proved or acknowledged in the manner prescribed by law, be admitted to record by the clerk of the county court of the proper county, such deed is not duly admitted to record. *Cox* v. *Wayt*, 807.

2. If such a deed so admitted to record be copied by such clerk into the deed-book, it is not by being so copied into such book "duly admitted to record." *Id.*

3. Such deed so admitted to record and copied into the deed-book is void as to subsequent purchasers for valuable consideration without notice. *Id.*

4. Such deed so improperly admitted to record and copied into such deed-book is not a recorded deed, and the same is not notice to subsequent purchasers. *Id.*, 808.

5. Where the execution of a deed or other writing is acknowledged by the grantor or proved before the clerk of a county court, it is the duty of such clerk to certify such acknowledgment or proof upon the said deed or in some writing thereto annexed, and when the same is admitted to record, to record the same with the deed in the same manner as acknowldgments before other officers are required to be recorded. *Id.*

6. "W." conveyed land to C. in trust to secure to "B." $4,600.00, which deed was never recorded; three years afterwards "W." conveyed the same land in trust to "P." to secure, first, to Susan E. a debt of $950.00 and second, to secure ratably to "G. E." and "F. M. W." and other creditors of "W." certain specified debts, which last deed was on the date thereof, duly recorded. Of the creditors of "W." whose debts were secured by the deed to "P." "Susan E.," "G. E.," and "F. M. W." alone, had notice of the un-recorded deed to "C." The land having been sold in a suit between these trust-creditors, and the proceeds of the sale proving insufficient to satisfy all of said trust-debts, HELD:

   I. That the deed to "C." was void as to all the creditors secured in the deed to "P." except "Susan E.," "G. E." and "F. M. W." who had notice thereof. *Id.*

   II. That all the creditors of "W." whose debts were secured in the deed to "P." except "Susan E.," "G. E." and "F. M. W.," were subsequent purchasers for valuable consideration without notice, and that they were entitled to have their debts paid in full, before "B." was entitled to receive any part of the proceeds of such sale. *Id.*

   III. That "Susan E." was entitled to charge the land with the amount of her debt subject only to so much of the said $4,600.00 as remained unpaid at the time of said sale. *Id.*

RECORDATION—*Continued.*

IV. That until "Susan E.," "G. E." and "F. M. W." shall be fully paid the amounts of their several debts, "B." is only entitled out of such proceeds to receive so much of the unpaid balance of said debt of $4,600.00 as may remain after deducting therefrom the several amounts due to said creditors secured in the deed to "P." who had no notice of the un-recorded deed to "C." *Id.*

V. That when "B." shall have received that amount out of said proceeds, the residue thereof must be applied, *first*, to pay to "Susan E." the full amount of her debt; *secondly*, to pay ratably to "G. E." and "F. M. W." the full amount of their several debts, and the residue, if any, upon the trust-debt of "B." of $4,600.00. *Id.* 809.

7. If a lien-creditor, standing in the position of a subsequent purchaser for valuable consideration without notice, transfers his debt to an assignee, who had notice of a prior un-recorded deed, such assignee will hold such debt from such un-recorded deed in the same manner, as his assignor was entitled to hold the same. *Id.*

RE-COUNT. See *Elections*, 2.

REDEMPTION. See *Tax-Sale*, 2.

RE-HEARING. See *Commissioner*, 5-7.

REMOVAL OF CAUSES.

Under the Act of Congress, March 3, 1875, it is too late to make an application to remove a case from the State to the Federal court, several terms after an answer has been filed and excepted to, and the exceptions not passed upon by the court, when the exceptions might have been passed upon, and the case heard at the time such answer was filed. *Chapman* v. *Railroad* Co., 299.

REPEAL.

1. A subsequent statute revising the whole subject-matter of a former one and evidently intended as a substitute for it, though it contains no express words to that effect, must on principles of law as well as in reason and common sense operate as a repeal of the former law. *Herron* v. *Carson*, 62.

2. The 38th sec. of ch. 194 of Acts of 1872-3, directing county courts in certain cases to award writs of *ad quod damnum* returnable to such county courts is repealed by the 38th sec. of ch. 14 of Acts of 1881, which provides that the county courts in such cases shall institute and prosecute in their names in the circuit court proceedings to ascertain the just compensation to be

REPEAL—*Continued.*

paid to the tenants and proprietors of lands taken for a public road. *Id.*

3. To repeal a statute by implication it must appear, that the latter provision is certainly and clearly hostile to the former. If by any reasonable construction the two statutes can stand together, they must so stand. *State* v. *Enoch*, 254.

REPLICATION. See *Pl. & Pr.*, 1, 2.

REPORT. See *Commissioner*, 1-8; *Roads*, 2.

RES JUDICATA.

1. Either party plaintiff or defendant is estopped from alleging in a suit at common law or in chancery anything inconsistant with any point, which has been before adjudicated by a court of either common law or chancery of competent jurisdiction; and the conclusiveness of any judgment or decree extends beyond what may appear on the face of the judgment or decree to every point, which was at issue and determined in the course of the proceedings. *Poole* v. *Dilworth*, 583.

2. A decision upon a demurrer, though it be but a decree dismissing the plaintiff's bill, will be conclusive of every matter whether specially stated in the bill or not, provided it is clear, that such matter was necessarily in controversy in the suit and was decided in it, otherwise such decree will not be conclusive of such matter. *Id.*

3. To obtain the benefit of *res judicata* it must be pleaded. *Beall* v. *Walker*, 742.

RETRAXIT.

1. There is a demurrer to a declaration and to each of the six counts thereof, the court sustains the demurrer as to *four* counts and overrules it as to *two* which set out a different cause of action. A subsequent order, which recites, that the demurrer had been sustained as to four of the counts in the declaration leaving and sustaining only the third and fourth counts, says as to them: "On which the plaintiff is unwilling to risk his case alone, he suffers a non-suit as to them without fine, which the defendant waives," and then proceeds: "It is therefore considered by the court, that the plaintiff be nonsuited as to said counts, and that defendant recover against the plaintiff his costs herein expended. HELD:

   I. It was not a nonsuit as to the two counts. If a nonsuit at all, it went to the whole case, as there is no such thing as a partial nonsuit.

RETRAXIT—Continued.

II. It was not a nonsuit but was a *retraxit* as to the said third and fourth counts, and a final judgment on the demurrer to the other *four* counts.

III. It was also a judgment against the plaintiff on the said third and fourth counts, and no suit could ever be prosecuted for the same cause of action, as is set out therein or in either of them. *Railway Co.* v. *Long*, 692.

RETURN. See *Habeas Corpus*, 1 ; *Pl. & Pr.*, 3–5.

REVERSAL OF DECREES.

A decree although erroneous will not be reversed unless to the prejudice of the party complaining thereof. *McCandless* v. *Warner*, 754.

See *Parties*, 4.

ROADS.

1. A county court may appoint all three of the individuals composing the court a committee to view and report upon a county road proposed to be established. *Herron* v. *Carson*, 62.

2. Though it would be more formal for such committee to return their report in writing, signed by each of the members of such committee, yet if on the return of the report of the committee it is not thus reduced to writing and signed by each member, but in lieu thereof the whole of their report containing all the details required by the statute-law is set out at length on the order-book of the county court in the form of a recital in an order of the court made on such report, this will suffice, and the court may proceed to establish the road, just as it could have done, had such more formal report signed by all the members of the committee been returned to the court. *Id.*

See *Repeal*, 2 ; *Tax-Sale*, 5.

ROBBERY. See *Indictment*, 2, 3, 12, 13.

SALE. See *Ex'rs & Adm'rs*, 1 ; *Judicial Sales ; Eviction*, 1, 2 ; *Tax-Sale ; Survey*, 1 ; *Vendor's Lien*, 4–7 ; *Trover*, 1–7.

SATISFACTION. See *Principal and Surety*, 3.

SCALING DEBTS. See *Confederate States Money*.

SET-OFF. See *Trespass*, 11.

SETTLEMENT. See *Ex'rs & Admr's*, 2 ; *Committee*, 2 ; *Partners and Partnership*, 3.

SHERIFF. See *Verdict*, 2 ; *Taxes*, 2.

SPECIAL REPLICATION. See *Pl. & Pr.*, 1, 2.

SPECIFIC PERFORMANCE.

When a contract was made for sale of a boundary of land set out therein for $5.00 per acre providing for the terms of the payment and giving immediate possession of the land, and the bill filed for the specific performance of the contract alleged the making thereof, the price per acre to be paid and the terms of payment, and that by survey made by plaintiff it amounted to a specified number of acres, and alleging the failure to pay the purchase-money, and praying a specific performance, HELD:

The bill is sufficient and demurrer thereto was properly overruled. *McCoy* v. *Bassett*, 570.

SPIRITUOUS LIQUORS, &c. See *Indictment*, 10; *Cider*, 2.

STATUTE OF FRAUDS. See *Trusts & Trustees*, 9–15.

STATUTE OF LIMITATIONS.

1. It is well settled, that while in cases of direct or express trusts, as between the trustee and *cestui que trust*, the statute of limitations has no application during the continuance and recognition of the trust, yet if the trustee repudiates the trust by clear and unequivocal acts and words, and claims thereafter to hold and control the estate as his own not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*. *Jones* v. *Lemon*, 629.

2. Unless there is an express saving in the statute of limitations, no person will come within its exceptions, and the prescribed limitations will operate against persons under disabilities as well as others; and the express exceptions refer only to such disabilities as exist at the time the right of action first accrued; for while, if several disabilities exist together at that time, the statute will only begin to run at the cessation of the last of them, yet if a second disability occur after those then existing have ceased, it can not be pleaded; for it is the settled law that when the statute has once begun to run no subsequent event will interrupt it. *Id.*

3. When the subject is land, of which the trustee has the legal title, and the *cestui que trust* is a member of his family living upon the land, if the trustee, asserting title in himself, conveys a part of the land by deed in his own name to a third person, whom he places in possession of the part so sold and takes the purchase-money to himself, the deed is placed upon record and there is no evidence that the trustee ever thereafter recognized the trust, but on the contrary claimed the residue of the land as his own, these acts and transactions will be regarded as a repudiation of the

STATUTE OF LIMITATIONS—*Continued.*

trust, and the statute of limitations will begin to run against the *cestui que trust* from that time. *Id.*

4. A judgment against the personal representative of a decedent is not even *prima facie* evidence of the debt against the heirs of such decedent. And in a suit brought by the plaintiff in such judgment against the heirs to subject the real assets descended, such judgment against the personal representative will not prevent the heirs from relying upon the statute of limitations as a bar to the original cause of action in such suit. *Sadler* v. *Kennedy*, 636.

5. Since the Code of 1849 of Virginia the real as well as the personal estate of the decedent is made assets for the payment of all classes of debts. While the personal estate is the primary fund for that purpose, the real estate is not only the secondary fund, but it is equally liable with the personal fund for the payment of all debts. Therefore since the adoption of said Code there can be no right of substitution or subrogation against the real estate by creditors, who have by reason of the bar of the statute of limitations lost their right to charge it directly, although they may have a subsisting judgment against the personal representative of the decedent and be thus entitled to charge the personal fund if any there be. *Id.*, 637.

See *Indictment*, 5; *Appeal*, 1-3; *Partners & Partnership*, 3.

STOCKHOLDERS. See *Corporations*, 1, 2.

SUBMISSION. See *Arbitration and Arbitrators*, 2.

SUBROGATION.

Where B. purchases a tract of land of W. and takes a general warranty-deed, and afterwards ascertains that judgments in favor of divers persons have been recovered and docketed against W., and to save his land from being sold to satisfy said judgment-liens B. pays off the judgments, he is entitled to be subrogated to the liens of such judgment-creditors against any other land owned by W. *Beall* v. *Walker*, 742.

SUPERSEDEAS. See *Habeas Corpus*, 1.

SUPREME COURT OF APPEALS. See *New Trial*, 1, 2; *Jurisdiction*, 1, 5; *Pl. & Pr.* 1, 2; *Record*, 1; *Commissioner*, 1-4, 7, 8; *Appeal* 1-4; *Abatement*, 1.

SURETY. See *Principal and Surety*, 1-3.

SURFACE-WATER. See *Trespass*, 3.

SURPLUSAGE. See *Indictment*, 4, 11, 18.

SURVEY.

Where there is a sale of land by the acre, a right of survey exists whether expressly reserved or not; and if no time is limited for making the survey, it may be made at any time before the whole business is closed between the parties. *McCoy* v. *Bassett*, 570.

TAX-DEED. See *Taxes*, 2.

TAXES.

1. The payment of taxes on land by a purchaser thereof at a judicial sale, which is subsequently set aside and declared void, will be treated as a full satisfaction of all the taxes on such land for the time they shall have been so paid; and the owner of the land so sold will not forfeit his title thereto by reason of his not having had the land assessed and the taxes paid thereon in his name during the time the taxes were so paid by such purchaser. *Sturm* v. *Fleming*, 54.

2. Where a sheriff levies on sufficient personal property to pay the taxes on land, for which the levy was made, and the property is lost through his neglect or misconduct, for which the owner of the land is in no way responsible, the taxes so levied for are paid; and when after such levy and loss the land was returned delinquent and sold, and a deed made therefor, a court of equity will cancel such deed. *Campbell* v. *Wyant*, 702.

3. *Quære.*—Is that part of sec. 25 of ch. 117, Acts 1872-3 constitutional, which declares: "No irregularity or over-charge as to a part of such taxes or purchase-money, nor payment of a part of such taxes, shall invalidate the sale except as to a part of the real estate so sold, proportioned to the whole thereof, as such part of the taxes or purchase-money is to the whole thereof?" *Id.*

See *Trusts and Trustees*, 1-3; *Injunction*, 1-6.

TAX-SALE.

1. The purchaser of land sold for taxes, who has obtained his tax deed therefor, and had the same duly recorded in the proper county, becomes invested with such estate in and to the land so purchased by him, as at the commencement of, or at any time during the year for which the said taxes were assessed was vested in the party assessed with said taxes. *Summers* v. *Kanawha*, 159.

2. If at the time of such sale the land sold be under a mortgage or deed of trust, or if there be any other lien or incumbrance thereon, and such mortgagee, trustee, *cestui que trust*, lienor or incumbrancer shall fail to redeem the same within the time prescribed by law, then all the right, title and interest of such mortgagee, trustee, *cestui que trust*, lienor or incumbrancer shall pass

TAX-SALE—*Continued.*

to and be vested in the purchaser at such tax-sale, and his title to the premises shall in no way be affected or impaired by such mortgage, deed of trust, lien or incumbrance. *Id.*

3. Where land has been so purchased by and conveyed to the purchaser, and his tax-deed therefor has been duly recorded, and before the land was so sold, it has been conveyed to a trustee to secure the payment of a debt, such tax-deed will extinguish the title vested in such trustee by said deed of trust. *Id.*

4. Where the trustee in such deed of trust pretends to sell and convey the land so conveyed to him as trustee under the provisions thereof, after the said land has been sold for the delinquent taxes thereon, and the purchaser thereof at such tax-sale has obtained and duly recorded his tax-deed therefor, such pretended sale and conveyance of said land by such trustee will be inoperative and void. *Id.*

5. Where a tract of land has been sold for taxes, and after such sale, and before the title of the purchaser has become absolute, the county court of the county, in which the land lies, has by proper proceedings regularly established a public road over said land without compensation with the consent in writing of the owner thereof in fee, and such purchaser afterwards obtains a tax-deed for said land and has the same duly recorded, such tax-deed will not confer upon him any right to demand and recover any compensation for the land so appropriated for such public road; and if such purchaser afterwards conveys said land to a third party, his deed to such *third* party will not confer upon him any right to such compensation or damages. *Id.* 160.

See *Trusts and Trustees*, 2, 3; *Taxes*, 2, 3.

TENANT IN COMMON. See *Widow*, 1.

TIME. See *Indictment*, 8, 10.

TITLE.

1. A court of equity has a right to cancel a deed which is a cloud upon the title of one out of possession of the land. *DeCamp* v. *Carnahan*, 839.

2. Where an attachment-suit in equity was instituted to subject land to the payment of a debt, and the land was sold under a decree in said cause, and a deed was made for the property to the purchaser at such sale, but after the levy of the attachment the debtor conveyed for a valuable consideration the land to another, and no *lis pendens* was recorded, as is required by sec. 14 of ch. 139 of the Code, the purchaser from the debtor will hold the land as against the purchaser under the decree. *Id.*

TITLE—*Continued.*

3. And this defect in the title of such purchaser at the sale under the decree was such, as all subsequent purchasers from him were bound to notice. *Id.*

See *Taxes*, 1; *Writ of Error*, 1; *Ejectment*, 1, 2; *Jurisdiction*, 7; *Trespass*, 1.

TRESPASS.

1. To warrant the interference of a court of equity to restrain a trespass on land, two conditions must co-exist: *first*, the plaintiff's title must be undisputed or established by legal adjudication; and *second*, the injury complained of must be irreparable in its nature, unless there exist other grounds of equity. *Cresap* v. *Kemble*, 603.

2. It is not sufficient in such case, that the bill contain general allegations of irreparable injury; the facts constituting such injury must be set forth. *Id.*, 604.

3. A declaration in case for diversion of surface-water held sufficient. *Gillison* v. *Charleston*, 16 W. Va. 282, and *Knight* v. *Brown*, 25 W. Va. 808, *adhered* to. *Hargreaves* v. *Kimberly*, 787.

4. A party has a right to deal with a run on his land, as he sees fit, provided he does not cause the run in its usual condition to encroach upon the property of another. *Id.*, 788.

5. In repairing, maintaining or replacing the banks of a run on his own land a person has no right to change or narrow the natural course of the run, so as to cause it to encroach upon the property of another and injure him. *Id*

6. Where the record does not show, whether certain instructions made part of the record were given or refused, the appellate court can not consider them. *Id.*

7. In an action for damages for diverting water from a run it was not error to refuse the following instruction asked for the defendant: "The defendant is not liable to plaintiffs for any washing slipping or other injury to their property resulting from an extraordinary and unusual condition of the run." *Id.*

8. In an action for damages for diverting water it is proper to ask a witness to state from facts within his own knowledge what in his *opinion* was the amount of damages suffered by the plaintiff because of such diversion of the water; and to authorize the giving of such opinion it is not necessary that the party be an expert. *Id.*

9. But it is error to permit a witness to answer in a case like this the following question: "What will be the future damage to the property from the acts of the defendant?" *Id.*

TRESPASS—*Continued.*

10. Where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed, that the defendant would remove it rather than suffer at once the entire damage, which it might inflict if permanent, then the entire damage can not be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues. *Id.*

11. One trespass can not be set off in bar of another; but where the damage alleged by the plaintiff is caused in part by the wrongful act of the plaintiff, the defendant may by way of defence under the plea of not guilty prove such wrongful act of the plaintiff in *mitigation* of damages. *Id.*, 789.

TRIAL BY COURT IN LIEU OF A JURY. See *Exception*, 1, 2.

TROVER.

1. To maintain *trover* the plaintiff must show a conversion of personal property by the defendant, and that he had at the time of the conversion a general or special right of property in the thing converted and also the possession of a right to the immediate possession thereof. *Haines* v. *Cochran*, 719.

2. In such action a conversion may be proved in three ways: *first*, by a tortuous taking; *second*, by any use or appropriation to the use of the defendant indicating a claim of right in opposition of that of the plaintiff or owner; and *third*, by a refusal to deliver possession to the owner on demand. *Id.*, 720.

3. When the action is by a buyer against the seller, and the contract is that the goods shall be paid for on delivery, the plaintiff can not maintain the action, if he fails to prove that he has paid the full price before the action is commenced. *Id.*

4. But if the goods are delivered at the place appointed by the contract of sale, and the defendant claims to hold possession only until the purchase-money is paid, the plaintiff will be entitled to recover, if he proves on the trial that such claim of the defendant is unfounded, and that he had in fact paid the full price, before the action was commenced. *Id.*

5. Where the plaintiff had two distinct and separate contracts for the delivery of staves at a specified place, to be paid for on delivery, and the plaintiff claims in his declaration the value of all the staves in both contracts, but the proof shows that he had

TROVER—*Continued.*

paid for the staves delivered under one contract only, he may recover for the staves delivered under that contract, although he is not entitled to recover for the staves embraced in the other. *Id.*

6. In this action the court properly instructed the jury, that if they believed from the evidence that the plaintiff had purchased and paid for the staves in the declaration mentioned, that the defendant delivered them to the plaintiff and afterwards came into possession of them without the consent of the plaintiff, then the plaintiff was entitled to recover. *Id.*

7. The giving of a trust-deed on the property sought to be recovered, which requires the plaintiff to deliver the property to the trustee, does not take from the plaintiff the right to recover from a person not claiming under such deed. *Id.*

TRUST-DEED. See *Trover*, 7; *Recordation*, 1-7.

TRUSTS AND TRUSTEES.

1. Where a debt is secured by a deed of trust upon the land of the debtor, not in the possession of the creditor, who is not otherwise interested in the said land, such creditor is under no obligation to pay the taxes upon said land in the absence of any covenant, promise or agreement to do so. *Summers* v. *Kanawha*, 160.

2. Where such trust-creditor is neither in possession of the lands charged with such trust-debt nor bound by any covenant, promise or agreement to pay the taxes thereon; and where no relation of trust or confidence between him and the trust-debtor exists, he is not precluded from acquiring at a tax-sale the title to the land conveyed by said deed of trust to secure the payment of his trust debt. *Id.*

3. Where a trust-creditor, whose debt is secured by a deed of trust upon a tract of land liable to be sold for the non-payment of the taxes thereon, instead of paying such taxes, or redeeming the land from the purchaser at a tax-sale thereof, becomes himself the purchaser thereof in his own name or in the name of another acting as his agent for that purpose, he will be regarded as having elected to hold the land as such purchaser subject to all the advantages and disadvantages pertaining to his character as such; and he will not be permitted to treat his purchase at the tax-sale as a payment of the taxes or a redemption of the land without the consent of his creditor. *Id.*

4. To authorize an investment by a fiduciary under an order of a judge in Confederate bonds the act of the Virginia Legislature of March 5, 1863, required, that these conditions should concur: First, The money must be in the hands of the fiduciary. Second,

TRUSTS AND TRUSTEES—*Continued.*

It must have been received in the due exercise of his trust. Third, For some cause he must have been unable to pay it out to the party entitled to it. And if in any case they did not all exist, the fiduciary is responsible for the money. *Knight* v. *Watts*, 176.

5. If it was the duty of trustees to invest the funds of their *cestui que trust*, and they were safely invested and secured amply on land, and these trustees were to collect the money so invested in Confederate notes largely depreciated and should re-invest it in Confederate bonds, which became valueless, such trustees would be responsisible to the *cestui que trust* for the amount of such money so improperly collected and re-invested. *Id.*

6. A testator devised a sixth of his estate to trustees for the use of his grandson, who was an imbecile, his portion to be held by them and the interest expended annually in his support and education, till he should attain the age of twenty-five years. When this grandson attained the age of twenty-two years, these trustees claiming that they had invested the whole of his estate in a Confederate bond, which was not shown to be true, and having furnished no support for more than a year claiming that they owed nothing, his whole estate being lost by its investment in a Confederate bond, entered into an agreement with him, which he had not sufficient mind to fully comprehend, whereby he in effect released them from responsibility for the amount, which came into their hands, to an extent exceeeding $1,000.00. Such agreement ought not to be held binding on him, and his trustees should be required to settle their accounts, as if no such agreement had been entered into with him. *Id.*

7. If the trustee in the deed of trust to secure a debt without the authority or knowledge of the creditor secured thereby receives from the grantor in said deed of trust a conveyance of this tract of land to this creditor for the amount of his debt secured by this deed of trust, and the trustee simply takes this absolute deed of this grantor and debtor but in no way induces him to execute it, but the creditor and grantee on being notified of the transaction assents to it, this deed is not voidable at the instance of the grantor because of the supposed agency of the trustee in this transaction, as, when the deed was executed, the trustee was not the agent of the grantee in the deed to purchase for him this tract of land. *Matheney* v. *Sandford*, 386.

8. If a conveyance be made by A. to B., and at the same time and as a part of the same transaction B. executes a written paper, wherein he declares, that he purchased the land in trust for C ; this constitutes an executed and express trust, and as such it is valid, though C. gave no consideration whatever for being thus made the *cestui que trust.* If B. afterwards conveys this land to D.,

TRUSTS AND TRUSTEES— *Continued.*

who has notice of this trust, a court of equity will set aside such conveyance as fraudulent. *Titchenell* v. *Jackson*, 460.

9. If a party obtain a deed for property, for which he has paid a valuable consideration, and if sec. 7 of the English statute of frauds substantially exists in this State, although in terms it is omitted from our statute, it may be shown, that such party holds the property so conveyed in trust for another. *McCandless* v. *Warner*, 754.

10. Such trust need not be created in writing but must be manifested and proved in writing by the party enabled by law to declare the trust; and such writing must show both the existence of the trust and the terms thereof. *Id.*

11. The writing to prove such trust need not be made at the time the trust is created, but may be made at any time thereafter, and it is not necessary that it be addressed to the *cestui que trust* or to any other person. *Id.*

12. Letters written to any one after the creation of the trust, in which the trust and the terms thereof are admitted and disclosed, are a sufficient declaration of such trust within the statute. *Id.*, 755.

13. It is not necessary, that the trust and the terms thereof shall all appear in one letter or other writing, but if they can be ascertained with reasonable certainty from a number of letters or from one or more letters and other writings, it is sufficiently proved. *Id.*

14. In ascertaining the meaning of such writings the court will, if necessary, look to the surrounding circumstances. *Id.*

15. An express trust needs no consideration to support it. *Id.*

Quære. Is sec. 7 of the English statute of frauds, although in terms omitted from our statute, substantially in effect in this State, and can a trust like that shown in this cause be proved by parol evidence?

16. After a party has denied an express trust in a suit to have the trust declared, and after the trust and the terms thereof are in writing proved to the satisfaction of the court, it is proper to put the trust-property into the hands of a receiver. *Id.*

See *Tax-Sale*, 2–4; *Statute of Limitations*, 1, 2, 3; *Trover*, 7; *Recordation*, 1–7.

UMPIRE. See *Arbitration and Arbitrators*, 1, 2.

USURY.

1. Under the provisions of the act of Congress—U. S. Rev. Stat. secs. 5197, 5198—usurious interest, *actually paid* to a national bank

USURY—*Continued.*

on discounting and renewing a series of notes, can not in an action by the bank on the last of them be applied in satisfaction of the principal of the debt. *Bank* v. *Boylen*, 154.

2. The said act having prescribed as the penalty for taking usurious interest, that the person paying the same may in an action recover twice the amount so paid, he can resort to no other mode or form of procedure. *Id.*

3. Congress having prescribed the penalty for the taking of usurious interest by a national bank and likewise the remedy for recovering such interest, the States and their courts are bound thereby and they can neither add to the penalty nor apply any remedy other than that so prescribed. *Id.*

VENDOR AND VENDEE. See *Eviction*, 1-3; *Parties*, 2; *Abatement*, 2; *Trover*, 3-6.

VENDOR'S LIEN.

1. The vendor of an equitable right or title to land retains an implied lien on it for the consideration, whenever under the same circumstances the vendor of the legal title would hold an equitable lien. The same principle and reason apply to both cases, except that our statute—sec. 1, ch. 75 of Code—qualifies the latter, while it has no effect upon the former. *Poe* v. *Paxton*, 607.

2. Such implied equitable lien of the vendor of an equitable title or estate, where the contract of sale is unrecorded, will be enforced by a court of equity against the vendee, his heirs, purchasers with notice and his unsecured or general creditors, but not against purchasers for value without notice, nor against mortgage or trust-creditors without notice. *Id.*, 608.

3. *Quære.*—Is not such equitable vendor's lien paramount also to the liens of the judgment-creditors of the vendor? *Id.*

4. In a suit to enforce a vendor's lien it is not error to decree a sale of the land, on which the lien for the purchase-money is reserved, without other lienors being made parties and the amount and priorities of their liens settled. *Neely* v. *Ruleys*, 686.

5. In a suit to enforce a vendor's lien the defendant filed an answer averring that there were many judgment-liens against the plaintiff's lands, and that he did not have other lands beside the tract sold defendant sufficient to discharge said liens, but did not aver, that the plaintiff was insolvent. The court did not err in refusing to set aside an order of sale on this ground, nor in refusing to send the cause to a commissioner to enquire into the matters set up in the answer. *Id.*

VENDOR'S LIEN—*Continued.*

6. A decree for the sale of land without providing therein that, before the commissioner shall sell the land, he shall execute a bond in a penalty prescribed by the court, is erroneous and for such error will be reversed. *Id.*, 687.

7. A plaintiff in a suit to enforce a vendor's lien can not waive the bond required by the statute of the commissioner appointed to make such sale. *Id.*

8. A bill by a vendor to enforce his vendor's lien sets out an agreement between the plaintiff and the purchasers, by which it was agreed the land should be the joint property of the plaintiff and the purchasers, that it should be laid off into town-lots, the lots sold, and the net proceeds applied to the payment of the plaintiff's lien, and the residue, if any, of the lien paid by the purchasers; that lots had been sold by the parties as a company or partnership partly for cash and partly on credits; that all the purchase-money had become due and a large portion of it remained unpaid, and prayed that the transactions of the company and the accounts of the sales of lots might be settled and for a decree against the purchasers for the balance of the purchase-money, HELD:

   Such bill is not multifarious, nor is it demurrable for the reason that the purchasers of the lots so sold are not parties to it. *Carskadon* v. *Minke*, 729.

9. In a suit to enforce a vendor's lien the plaintiff may properly take a personal decree against the purchasers for the balance ascertained to be due him from them, and it is in the discretion of the court to authorize the plaintiff to enforce such personal decree without waiting for the collection of the proceeds of the land subject to such lien. *Id.*, 730.

   See *Widow*, 1; *Jurisdiction*, 2; *Parties*, 2.

VERBAL DECLARATIONS. See *Agreement*, 1.

VERDICT.

1. Verdicts in neither civil nor criminal cases will be set aside for objections to jurors on grounds, which existed before they were sworn, unless it appears that by reason of the existence of such grounds the party objecting has suffered wrong or injustice; and in no case would a verdict be set aside for a matter, which was a principal ground of challenge to a juror unless it was shown to the court that such juror had prejudged the case. *State* v. *Howes*, 111.

2. A verdict in a misdemeanor case will not be set aside, because the

VERDICT—*Continued.*

sheriff of the county had, after the jury was sworn, made a bet that the jury would find the defendant guilty. *Id.*

See *Bill of Exceptions*, 1; *New Trial*, 5-7; *Demurrer to Evidence*, 5.

WAIVER. See *Exception* 1, 2, 4; *Ex'rs & Adm'rs*, 1; *Vendor's Lien*, 7; *Evidence*, 11.

WATER-COURSE. See *Deed*, 2-5,

WIDOW.

1. A widow entitled to dower in the real estate of her deceased husband, is neither a joint-tenant, tenant in common nor coparcener with the heirs at law within the meaning of the statute concerning partition (Code, ch. 79), so as to authorize a court of equity to sell the legal estate of the heirs descended to them, and to have her dower assigned to her out of the proceeds, and the residue divided among the heirs and those having vendor's liens on the lands, if any one heir refuses to give his assent thereto, or if any one heir be an infant defendant, the widow being the plaintiff in the suit. *Hull* v. *Hull*, 1.

2. A widow can not bring a suit in chancery to have all the lands of her husband sold, and out of the proceeds of such sale to have the value of her dower paid, and the residue paid to the creditors of her husband, and if any surplus remains, to have it divided among her children the sole heirs of her husband. Such general creditors' bill she can not bring; and no suit, which she brings, can by petition or in any other manner be converted into a creditors' bill. *Id.*, 2.

WILLS. See *Ex'rs & Adm'rs*; *Trusts and Trustees*, 6.

WITHDRAWAL OF PLEA. See *Disclaimer*, 1-

WITNESS. See *Partners and Partnership*, 2; *Trespass*, 8, 9.

WRIT OF ERROR.

1. If in an action of trespass *quare clausum fregit* the damages recovered be less than $100.00, the defendant can not obtain a *writ of error* from this Court, though it appears from the record, that the title or boundaries of the land were drawn in question. *Greathouse* v. *Sapp*, 87.

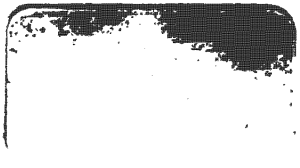
2. An order is entered by the circuit court sustaining the defendant's demurrer to the plaintiff's declaration and each count thereof which concludes as follows: "And thereupon this action is remanded to rules with leave to plaintiff to amend his declara-

WRIT OF ERROR—*Continued.*

tion," and from this order the plaintiff obtains a writ of error to this Court; HELD:

I. This Court will presume, the record not showing affirmatively the contrary, that the case was remanded to rules at the instance of the plaintiff.

II. Such order is not a final judgment from which a writ of error will lie to this Court. *White* v. *Railway Company*, 800.

See *Habeas Corpus*, 3; *Exception* 3; *Bill of Exceptions*, 1; *New Trial*, 4, 8.

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